

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY C. CUTTING,

Appellant,

vs.

HENRY J. WOODWARD, FRANCIS A. WOOD-
WARD, and THE MONETARY TRUST
COMPANY, a Corporation,

Appellees.


Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Second Division.

Filed

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F. D. Moulton,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Stipulation [That Third Amended Complaint may
be Filed].**

It is hereby stipulated and agreed by and between the parties in the above-entitled action, by their respective attorneys, that the plaintiffs may file their **THIRD AMENDED COMPLAINT**, which is attached to this stipulation, without prejudice.

JNO. B. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Plaintiffs.

WM. H. H. HART,
Attorney for Defendants.

Dated December 11th, 1913. [1*]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

**HENRY J. WOODWARD and FRANCIS A.
WOODWARD,**
Plaintiffs,

vs.

**HENRY C. CUTTING and THE MONETARY
TRUST COMPANY, (a Corporation),**
Defendants.

Third Amended Complaint.

Now come the plaintiffs and by leave of Court first had and obtained file this their third amended bill in equity against the said defendants, and allege as follows:

*Page-number appearing at foot of page of original certified Record.

I.

That plaintiffs, and each of them, now are, and at all the times hereinafter stated were, citizens of the United States and of the State of Illinois, and residents of the State of Illinois; that the defendant, Henry C. Cutting, is now, and at all the times hereinafter stated was, a citizen of the United States and of the State of California, and a resident of the State of California, and of the Northern District of said State; that The Monetary Trust Company is now, and at all the times hereinafter stated was, a corporation organized and existing under and by virtue of the laws of the State of California, and has, and had, at all the times hereinafter stated, its principal place of business in the city and county of San Francisco, within said State of California, and in the Northern District thereof, and that The Monetary Trust Company is now, and at all the times hereinafter stated was, a citizen of the State of California, and a resident of said State of California, and of the Northern [2] District thereof; that the amount of the controversy between the plaintiffs and the defendants herein, and in this action exceeds exclusive of costs and interest, the sum of Two Thousand Dollars (\$2,000). That this action is brought by plaintiffs for and on behalf of themselves and any and all other stockholders of the defendant, The Monetary Trust Company, similarly situated who may join with plaintiffs in this action.

II.

That this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of

which it did not have cognizance, or otherwise, or at all collusive; that prior to the bringing of this action, and continuously for three (3) months theretofore, plaintiffs requested and demanded of the board of directors, the manager and the other officers of the defendant, The Monetary Trust Company, and of each of them, that proceedings be at once instituted, or an action be at once commenced and prosecuted with diligence in the name and favor of The Monetary Trust Company, to establish the right to relief of said defendant, The Monetary Trust Company, and the plaintiff, as hereinafter alleged, and to procure a decree granting said relief. That the defendant, The Monetary Trust Company, and each and all of its other officers and directors have uniformly and at all times refused to institute any proceedings of any character against said defendant, Henry C. Cutting, for the purpose of establishing the rights of plaintiffs and of said defendant, The Monetary Trust Company, as hereinafter alleged, or to compel said defendant, Henry C. Cutting, to account to said defendant, The Monetary Trust Company, and to these plaintiffs and the other stockholders of said company for the assets and funds of said defendant, The Monetary Trust Company, or to [3] attack the validity of a certain pretended sale by the officers of the said defendant, The Monetary Trust Company, to the defendant, Henry C. Cutting, of eleven hundred and seventy-five (1175) shares of the capital stock of the Point Richmond Canal and Land Company, as hereinafter alleged; that plaintiffs also negotiated with numerous stockholders of said de-

fendant, The Monetary Trust Company, endeavoring to induce such stockholders and each of them to either take proceedings in their own names or to join with plaintiffs in this proceeding and action for the purpose of establishing the rights of the defendant, The Monetary Trust Company, and the plaintiffs herein, and the other stockholders of said defendant company as hereinafter particularly alleged; plaintiffs further allege that because of the fact that a majority of the directors and officers of the defendant, The Monetary Trust Company are now and always have been under the complete control and domination of defendant, Henry C. Cutting, and because the majority of the stockholders of the defendant, The Monetary Trust Company, have also been and now are under the complete control and domination of said defendant, Henry C. Cutting, none of said stockholders or officers of said defendant, The Monetary Trust Company, have taken any steps to bring suit or institute any proceedings to establish the rights of the defendant, The Monetary Trust Company, and of plaintiffs, and the other stockholders of said defendant, The Monetary Trust Company, and to protect said plaintiffs by a proper decree of the Court, and have neglected and refused so to do. Upon information and belief plaintiffs allege that none of the directors or officers of the defendant, The Monetary Trust Company, who are above alleged to be under the control of the defendant, [4] Henry C. Cutting, are the *bona fide* owners and holders of any shares of the capital stock of said company, but that sufficient shares of the stock in said

company to qualify said officers in accordance with the by-laws of the company have been issued to each of them by said defendant, Henry C. Cutting, or through his influence or command, in order that he might control a majority of the board of directors of said defendant, The Monetary Trust Company, and its other officers.

III.

That Henry J. Woodward, one of the plaintiffs herein, because the equitable owner and holder, for a valuable consideration, of about six hundred (600) shares of the par value of One Hundred Dollars (\$100) each of the capital stock of said defendant, The Monetary Trust Company, on or about the 5th day of January, 1905, and that he is now, and at all the times hereinafter stated has been the *bona fide* equitable owner and holder of said stock for a valuable consideration;

That Francis A. Woodward, one of the plaintiffs herein became the legal owner and holder, for a valuable consideration, of five (5) shares of the par value of One Hundred Dollars (\$100) each, of the capital stock of said defendant, The Monetary Trust Company, on or about the 5th day of January, 1905, and that he is now, and at all the times hereinafter stated has been the *bona fide* and legal owner and holder of said stock for a valuable consideration; that the plaintiffs herein were, and each of them was a *bona fide* owner of said stock in the defendant corporation, The Monetary Trust Company, at the time of each and all of the transactions hereinafter complained of.

That The Monetary Trust Company was the owner and [5] holder of eleven hundred and seventy-five (1175) shares of the par value of One Hundred Dollars (\$100) each of the capital stock of the Point Richmond Canal and Land Company, on and before the 20th day of December, 1906; that said defendant, The Monetary Trust Company, ever since has been and now is the *bona fide* owner and holder thereof, and has a full, free and clear title thereto, except as such title is clouded by the acts of the defendants as hereinafter alleged.

IV.

That some time prior to June 11th, 1904 defendant Henry C. Cutting, became the possessor of certain of the capital stock of the defendant, The Monetary Trust Company; that the said stock was issued and stands on the books of the company in the name of said Henry C. Cutting, but these plaintiffs allege upon their information and belief that said defendant, Henry C. Cutting, did not pay the par, actual or market value of said stock in cash or turn over and transfer to said defendant, The Monetary Trust Company, any property, or rights, or perform any services equal in value to the said stock;

Plaintiffs further allege upon their information and belief that the defendant, Henry C. Cutting, acquired said stock without the payment of any sufficient cash consideration therefor, or turning over and transferring to said company property or rights, or performing services for said company as a sufficient payment for, or upon said capital stock; that the number of shares of stock now standing upon the

books of said company in the name of defendant, Henry C. Cutting, as these plaintiffs are informed and believe, are seven hundred and fifty-three (753) shares of stock.

These plaintiffs are informed and believe and therefore [6] allege that said defendant, Henry C. Cutting, promised and agreed with the defendant, The Monetary Trust Company, and its officers in that behalf duly authorized, at or before the time any of said stock was issued to him that he would pay into the treasury of the defendant, The Monetary Trust Company, Ten Dollars (\$10) per share for five hundred (500) shares of said stock, and would also finance said company and place it in such condition that it could safely proceed with its business in a proper method and manner. That said Henry C. Cutting has failed to comply with, or perform his said agreement; that he has only paid into the treasury of the company a few hundred dollars, as near as these plaintiffs are able to ascertain.

V.

Plaintiffs further allege that the assumed records of the defendant, The Monetary Trust Company, of a directors meeting claimed to have been held on or about the 20th day of December, 1906, contain a statement that the following resolution was unanimously passed by the board of directors, viz.: "Mr. H. W. Wernse presented the check of H. C. Cutting for \$1175.00 stating that Mr. Cutting desired to exercise his rights under the option given him by The Monetary Trust Company ratified and confirmed by the stockholders at their last meeting to purchase

1175 shares of the Point Richmond Canal and Land Company stock, held by The Monetary Trust Company, at \$1.00 per share." These plaintiffs allege that according to the by-laws of said company the meeting held on the 20th day of December, 1906, was not a regular meeting of the board of directors of the defendant, The Monetary Trust Company; that such meeting was not properly called in accordance with the by-laws, and the Statutes of the [7] State of California; that the record of said meeting discloses that there were present at said meeting only directors, Henry C. Cutting, one of the defendants herein, W. J. Morgan, and H. W. Wernse, and that directors, Albert Betz and H. B. Mayo were absent. That in accordance with the said by-laws three (3) directors are required to be present to constitute a quorum for the transaction of any business; that as shown and disclosed by said assumed record of said meeting, the above-recited resolution was passed unanimously, and was voted for by directors, W. J. Morgan, H. W. Wernse and the defendant, Henry C. Cutting; that said Henry C. Cutting participated in the vote passing said resolution, and voted for the passage of same; that under and by virtue of said resolution above quoted, the said defendant, Henry C. Cutting, claims that he became a *bona fide* owner and holder for a valuable consideration of the 1175 shares of the capital stock of the Point Richmond Canal and Land Company; that the said defendant, Henry C. Cutting's vote was necessary to the passage of said resolution and that said defendant, Henry C. Cutting, was a disqualified director and was not

allowed to vote thereon. That the said 1175 shares of the capital stock of the Point Richmond Canal and Land Company was on the 20th day of December, 1906, and for a long time prior thereto had, and now is, and ever since has been of great value, to wit, of at least the par value of One Hundred Dollars (\$100) per share; that said stock on said 20th day of December, 1906, and for a long time prior thereto was, and had been as plaintiffs are informed and believe, practically the only asset of the defendant, The Monetary Trust Company, of any appreciable monetary value.

Upon their information and belief plaintiffs further allege that said resolution was not properly or legally passed [8] by said board of directors of the defendant, The Monetary Trust Company, was insufficient to transfer and gave no authority to transfer to said defendant, Henry C. Cutting, said 1175 shares of stock in the Point Richmond Canal and Land Company, or any part thereof.

Plaintiffs further allege upon like information and belief that the check of Henry C. Cutting mentioned in the above-quoted resolution was never cashed by the defendant, The Monetary Trust Company, or by any of its officers, or anyone acting in its behalf, but that the same was returned to said Henry C. Cutting, who then and there pretended to borrow the same amount from the defendant, The Monetary Trust Company, and gave his note to the defendant, The Monetary Trust Company, for the same amount as was specified in said check, which note is still outstanding, and wholly unpaid.

Plaintiffs further allege that it is recited in the resolution above quoted, that the defendant, Henry C. Cutting, decided to exercise his right under the option given him to purchase 1175 shares of the stock in the Point Richmond Canal and Land Company, while plaintiffs allege on information and belief that in truth and in fact, no option of any kind had at that time, or has since that time or at all, been given to the said defendant, Henry C. Cutting, or any other person or persons to purchase said stock from the defendant, The Monetary Trust Company.

Plaintiffs further allege that by the resolution above quoted said option was "ratified and confirmed by the stockholders at their last meeting," while in truth and in fact no stockholders' meeting was held at or about that time, or for a [9] long time prior to said 20th day of December, 1906. That there are no minutes in the books of the defendant, The Monetary Trust Company, of any meeting of the stockholders of said company at or about, or before the 20th day of December, 1906, and that there is no record in any of the minutes of any of the meetings of the stockholders of the defendant, The Monetary Trust Company, in any way referring to the granting, confirming or ratifying any option for the purchase of eleven hundred and seventy-five (1175) shares of stock in the Point Richmond Canal and Land Company or any part thereof, or any mention of any ratification or confirmation of any option given by the said defendant, The Monetary Trust Company, or anyone in its behalf.

Plaintiffs further allege upon their information

and belief that said resolution above quoted set forth other matters and facts which did not exist, and was passed for the fraudulent purpose of allowing the defendant, Henry C. Cutting, to ostensibly acquire the right and title of the defendant, The Monetary Trust Company, in and to eleven hundred and seventy-five (1175) shares of the capital stock of the Point Richmond Canal and Land Company, when in truth and in fact, no sale of said stock had ever been legally authorized or made, and that defendant, Henry C. Cutting, had never paid anything upon the purchase price thereof, but that the entire transaction was fraudulently had by the defendant, Henry C. Cutting, and the directors of the Monetary Trust Company, who were then and ever since have been completely under his control and domination for the purpose of cheating and defrauding plaintiffs, The Monetary Trust Company, and the other stockholders of said company out of all interest in said stock,

Plaintiffs further allege that for many years last [10] past The Monetary Trust Company has not been engaged in the carrying on of any regular business, and has not required the services of any salaried officers in its employment; but, as plaintiffs are informed and believe, and therefore allege, said defendant, Henry C. Cutting, in the operation and carrying on of his own private business, has ostensibly caused his private stenographer and secretary employed by him in his private business to be employed by said defendant, The Monetary Trust Company, on salaries, which said defendant, Henry

C. Cutting, has fraudulently caused to be paid out of the asset of The Monetary Trust Company; that the business of said defendant, The Monetary Trust Company, has not for many years past required any office, but that as plaintiffs are informed and verily believe and therefore allege, defendant, Henry C. Cutting, has caused to be paid out of the assets of the said Monetary Trust Company large sums for rent of offices which he, the said defendant, Henry C. Cutting, has used exclusively in his own behalf, and for his own private business.

VI.

That since the said defendant, The Monetary Trust Company, has ceased to transact any business, and since the defendant, Henry C. Cutting, procured a majority of the directors of said company to be elected who are and have been completely controlled and dominated by said defendant, Henry C. Cutting, the said defendant, Henry C. Cutting, and said directors, as plaintiffs are informed and verily believe, and therefore allege, have purchased a large amount of office furniture, made elaborate and expensive changes in the interior of said offices, and purchased many hundred dollars' worth of office supplies, all of which, as plaintiffs believe were for the sole use and benefit [11] of said defendant, Henry C. Cutting, and some of the officers and directors of the Monetary Trust Company, *who* are and always were controlled and dominated by him, and not used by or for the defendant, the Monetary Trust Company, or in its business. On information and belief, plaintiffs further allege that said defendant, Henry

C. Cutting, and the directors controlled and dominated by him have uniformly and at all times caused payment for all such furniture, fixtures, changes and supplies to be made out of the moneys and assets of the defendant, the Monetary Trust Company, amounting to a large sum of money, the exact amount of which cannot be ascertained by these plaintiffs from an examination of the books and records of the said Monetary Trust Company; and plaintiffs have no information otherwise, but verily believe and therefore allege that the money so unlawfully misapplied and misappropriated by said Henry C. Cutting exceeds the sum of Five Thousand Dollars (\$5,000).

VII.

Plaintiffs further allege that by the official financial statement of the defendant, the Monetary Trust Company, bearing date May 14th, 1913, the following are all of the pretended assets of the Monetary Trust Company, viz:

100,000 Shares of Eldorado Gold Basin Dredging Company Stock	Value ————
Note, H. C. Cutting, 8%	\$1093.00
Interest on same to 4/27/13	307.51
Note, H. C. Cutting, 8%	1000.00
Interest on same to 4/27/13	183.67
Note, W. H. H. Hart	1000.00
Interest on same secured by 100,000 Shares of Eldorado Gold Basin Dredging Company Stock	—————
	\$2587.18

LIABILITIES:

Held in trust for Pacific Under-	
writing and Trust Company....	\$1093.00
Interest on same to 4/20/13.... $\frac{1}{2}$	307.51
	<hr/>
	\$1400.51
Nominal surplus	\$1186.67

Plaintiffs allege that there is nothing contained in said official financial statement which in any way or manner discloses the date of any of the respective notes mentioned therein, or the consideration therefor; that there is nothing contained therein which shows or discloses how or why the defendant, the Monetary Trust Company holds Ten Hundred and Ninety-three Dollars (\$1,093), and Three Hundred Seven and 51/100 Dollars (\$307.51) interest, in trust for the Pacific Underwriting and Trust Company, nor whether same is, or has been held as notes, obligations or cash, or why or how, or for what purpose any trust was ever created, or that any trust now exists or has ever existed, and that plaintiffs are without any information in relation thereto.

These plaintiffs further allege that in said financial statement above quoted it is set forth that the note of W. H. H. Hart is secured for 100,000 shares of the capital stock of the Eldorado Gold Basin Dredging Company, but that said financial report fails to disclose that said note of W. H. H. Hart is also secured by 300 shares of the capital stock of the Monetary Trust Company; that at the time said note was given said W. H. H. Hart pledged and delivered to said Monetary Trust Company three hun-

dred (300) shares of the capital stock of said company as security for the payment of said note and the interest thereon, and that said three hundred shares so pledged should have been shown upon [13] said financial report as having been pledged as security for the payment of said note; that said three hundred (300) shares of stock so pledged by said W. H. H. Hart is a further asset of said Monetary Trust Company.

Plaintiffs further allege that the said defendant the Monetary Trust Company, has received since its organization large sums of money from the sale of its capital stock, and other sources, the exact amount of which plaintiffs cannot state accurately, and they have been unable to ascertain such amount from the books of said company, but they verily believe and therefore allege that such sums, in the aggregate, amount to over Fifteen Thousand Dollars (\$15,000).

Plaintiffs further allege upon their information and belief that all the legitimate expenses and outlays of said Monetary Trust Company during the time it was doing business, determined from a very liberal estimate would not exceed the sum of Three Thousand Dollars (\$3,000). Plaintiffs allege that said defendant, Henry C. Cutting, has fraudulently misapplied, misappropriated and dissipated all the assets of said company.

VIII.

Plaintiffs further allege that shortly after the defendant, Henry C. Cutting, had agreed to purchase five hundred (500) shares of stock of the defendant, the Monetary Trust Company, at and for Ten Dol-

lars (\$10) per share, said company undertook the organization and promotion of the Point Richmond Canal and Land Company; that said Monetary Trust Company paid all of the expenses of the organization of said Point Richmond Canal and Land Company; that the said Monetary Trust Company became the owner of an option or contract to purchase four hundred acres of land in Point Richmond known as the South Marsh [14] situated in Contra Costa County, State of California, for Three Hundred and Thirty-six Thousand Dollars (\$336,000) out of Four Hundred Thousand Dollars (\$400,000) worth of bonds secured on said real estate to be purchased. That the defendant, the Monetary Trust Company, obtained said option or contract from Harry B. Mayo, and — Reichart; that there was an agreement and understanding between the Monetary Trust Company, and said Mayo and said Reichart that all of the capital stock of the Point Richmond Canal and Land Company should be issued as follows:

One-fourth ($\frac{1}{4}$) to Reichart; One-fourth ($\frac{1}{4}$) to Mayo, and one-half ($\frac{1}{2}$) to the Monetary Trust Company:

That said corporation should be capitalized at five thousand shares (5,000) of the par value of One Hundred Dollars (\$100) per share; that the defendant the Monetary Trust Company should own and have one-half ($\frac{1}{2}$) of the Sixty-four Thousand Dollars (\$64,000) worth of the bonds of said company out of the Four Hundred Thousand Dollars (\$400,000) worth of the bonds so to be issued; that said \$400,000 worth of bonds were duly issued by and at

the sole expense of the Monetary Trust Company, and Three Hundred and Thirty-six Thousand Dollars (\$336,000) thereof were delivered to the owner of said land in payment of the purchase price thereof; and the remaining Sixty-four Thousand Dollars (\$64,000) worth of said bonds were owned by said Point Richmond Canal and Land Company and were intended to be used by it in the development and sale of said property.

That the said Point Richmond Canal and Land Company became the owner of the legal title in fee simple of all of said land subject only to the \$400,000 bonds which had been issued in payment of said property; that subsequently to the issuance of said bonds The Monetary Trust Company turned over and delivered [15] one hundred and fifty (150) shares of said stock in the Point Richmond Canal and Land Company to A. N. Lewis, leaving said Monetary Trust Company, the owner of twenty-three hundred and fifty (2350) shares of said stock of said Point Richmond Canal and Land Company. That immediately after said transaction the defendant, Henry C. Cutting, proposed to The Monetary Trust Company that he would finance the Point Richmond Canal and Land Company and furnish all the funds necessary to develop and sell said land, provided he could obtain control of the stock of said company; that he would buy Ten Thousand Dollars (\$10,000) worth of the bonds and when that amount of money was spent, he would raise whatever further amount of money might be necessary; that the Monetary Trust Company accepted said proposition and delivered

to said defendant, Henry C. Cutting, one-half of the twenty-three hundred and fifty (2350) shares of the Point Richmond Canal and Land Company then owned by it, and said Henry C. Cutting procured from other sources sufficient stock to give to said defendant, Henry C. Cutting, a majority of all of the capital stock of the Point Richmond Canal and Land Company then issued and thus give him full control of said company. That said defendant, Henry C. Cutting, paid absolutely nothing for said stock and utterly failed to carry out his agreement to buy Ten Thousand Dollars (\$10,000) worth of said bonds and to finance said Point Richmond Canal and Land Company.

IX.

Plaintiffs further allege upon information and belief that all and singular the acts and doings of the defendant, Henry C. Cutting, as hereinbefore alleged, were fraudulent and intended so to be, and were done and committed by the said defendant, Henry C. Cutting, for the express purpose of cheating and [16] defrauding The Monetary Trust Company out of all its assets, property, rights and business, and of defrauding and cheating these plaintiffs and all the other stockholders out of their rights in and to any value in the assets of said defendant, The Monetary Trust Company; that said defendants, Henry C. Cutting, purposely, intentionally and fraudulently concealed his fraudulent practices in the performance of said acts and doings, from plaintiffs and the other stockholders by causing to be kept insufficient and inaccurate books of account and corporate records of the

affairs of said company, and lulled plaintiffs and the other stockholders into seeming security by statements made by him that all the stockholders of the defendant, The Monetary Trust Company, should be jointly interested with him, said Henry C. Cutting, in all profits which might grow out of any of his transactions with or pertaining to the business, property and affairs of the defendant, The Monetary Trust Company, and that he, the said Henry C. Cutting, should and would hold the title of eleven hundred and seventy-five (1175) shares of the stock in the Point Richmond Canal and Land Company in trust for the said defendant, The Monetary Trust Company.

Plaintiffs further allege that by said acts of said defendant, Henry C. Cutting, as hereinbefore alleged, in so far as the same or any of them were known to plaintiffs, or either of them, they and each of them were made to believe and did believe that the acts of said Henry C. Cutting, as hereinbefore alleged, were for the best interests of the defendant, The Monetary Trust Company, and all of its stockholders, and that said defendant, Henry C. Cutting, was honest in the performance of all such acts; that acting under such belief these plaintiffs and neither of them made any careful investigation of the book [17] accounts, records and transactions of the said defendant, The Monetary Trust Company, or of the acts and doings of said defendant, Henry C. Cutting; all this in full belief that said Henry C. Cutting was acting honestly and for the best interests of The Monetary Trust Company, and all of its stockholders;

These plaintiffs further allege that they subsequently discovered that said defendant, Henry C. Cutting, had been acting dishonestly and fraudulently with reference to the business affairs of the defendant, The Monetary Trust Company, with its assets and property and with the stockholders of said company and that they did not discover said fraud and fraudulent practices until on or about the month of January, 1913, and immediately after ascertaining the facts that the conduct of said Henry C. Cutting, as hereinbefore alleged, was fraudulent and intended for the purpose of defrauding plaintiffs, The Monetary Trust Company, and the other stockholders of said company out of all the property and assets of said company and the value of said stock, they instituted this suit for the purpose of submitting the entire matter to the court and protecting the value of their stock and requiring said defendant, Henry C. Cutting, to account for all moneys or property of the defendant, The Monetary Trust Company, which may have come into his hands since its incorporation, and to replace in the treasury of said company all the moneys, stocks or other securities for the benefit of the stockholders of said company, or recover judgment and decree against said defendant, Henry C. Cutting, requiring him to answer for same.

X.

Plaintiffs further allege that said defendant, Henry C. Cutting, was the president, and a director of The Monetary [18] Trust Company and at all times herein mentioned acted in a fiduciary capacity

for and towards plaintiffs and each and every stockholder of said company with reference to the assets, property and business of said company; and that it was his duty while acting in such fiduciary capacity not to deal in, or with any of said assets, property or business for individual benefit, but to conserve and care for such assets, property and business for the benefit and protection of said company and of all its stockholders; that the said defendant, Henry C. Cutting, has openly violated such duties and has misapplied, misappropriated and converted all the assets, property and business of said company to his own individual use and benefit, as hereinbefore alleged.

Plaintiffs allege that large amounts of money belonging to The Monetary Trust Company, the exact amount of which is unknown to plaintiffs, have come into the possession of the defendant, Henry C. Cutting, and that said Henry C. Cutting has misapplied, misappropriated and converted the same to his own use. Plaintiffs further allege that they have no plain, speedy or adequate remedy at law and therefore bring this their bill of complaint in a court of equity where all matters of accounting and fraud are fully cognizable.

WHEREFORE, these plaintiffs pray,—

1. That the defendant, Henry C. Cutting, be required to render under the orders and directions of this Court a full and accurate account of all the moneys, assets and property belonging to the defendant, The Monetary Trust Company, and to pay over to the treasurer of said company all sums found due

by this Court from the said defendant, Henry C. Cutting, on said accounting.

2. That this Court find and decree that the attempted fraudulent transaction of the defendant, Henry C. Cutting, whereby [19] he claims the title to twenty-three hundred and fifty (2350) shares of the capital stock of the Point Richmond Canal and Land Company, and each and all of said shares, be held void and ineffectual, and that said defendant, Henry C. Cutting, be required to surrender each and all of said twenty-three hundred and fifty (2350) shares and cause the same and the whole thereof to be reissued in the name of the defendant, The Monetary Trust Company.

3. That plaintiffs may have such other and further relief as to this Court may seem meet.

4. That plaintiffs recover their costs of suit in this behalf most unlawfully sustained.

JNO. B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors and Counsel for Plaintiffs.

[Endorsed]: Filed Dec. 11, 1913. [20]

At a stated term, to wit, the November term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 15th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

Order Dismissing Suit as to Certain Defendants.

Upon motion of Hobart L. Clayberg, Esq., attorney for plaintiffs, it was ordered that this suit be and the same is hereby dismissed as to said defendants said Point Richmond Canal and Land Company, a corporation, H. W. Wernse, Albert Betz, W. J. Morgan and H. B. Mayo. [22]

**Notice of Motion to Dismiss and Strike from the
Files Plaintiffs' Third Amended Bill in Equity
in the Above-entitled Suit.**

To Messrs. John B. Clayberg, and Clayberg & Whitmore, Solicitors for Plaintiffs:

Please take notice that on Monday, the 16th day of February, 1914, at the opening of court on said day, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of said court, Division No. 2, in the United States Postoffice Building in the city and county of San Francisco, State of California, a motion will be made to dismiss and strike from the files plaintiffs' third amended bill in equity, a copy of which motion is hereto annexed and served herewith.

San Francisco, California, February 9th, 1914.

WM. H. H. HART,
Solicitor for Certain Defendants. [23]

Motion of the Defendants, Monetary Trust Company and H. C. Cutting to Dismiss and Strike from the Files Plaintiffs' Third Amended Bill in Equity in the Above-entitled Suit.

The motion of the defendants, Monetary Trust Company, and H. C. Cutting, to dismiss said suit for want of jurisdiction, and to dismiss and strike from the files the plaintiffs' third amended bill in equity on file in the above-entitled action.

These defendants, and each of them, in their corporate and in their individual capacities, as aforesaid, by protestation, not confessing or acknowledging all or any of the matters and things in the plaintiffs' third amended bill of complaint in equity therein contained to be true, in such manner and form, and in such manner or form, as the same are therein set forth and alleged, do jointly and severally move to dismiss and strike from the files said third amended bill in equity on file in the above-entitled suit, and for cause of said motion and as grounds thereof, said defendants, and each of them, specify the following:—

First. To dismiss said suit in equity for want of jurisdiction.

1st. In that it appears that this Court has not jurisdiction either at law or in equity of said plaintiffs' said third amended bill in equity, in that it fully appears therefrom that said [24] corporation was created and existing under the laws of the State of California and has its principal place of business in said State; that H. C. Cutting, the other defendant

to said bill, is a citizen of the State of California; that the plaintiffs are not entitled to maintain said action in this court for the reason that said suit is for and in behalf of a corporation which is a citizen and resident of the State of California, and in that said suit must be prosecuted in favor of said corporation, a citizen of this State, and that it is not a personal suit in favor of said plaintiffs, and the amount involved is but \$2,000.

2d. In that it fully appears from said third amended bill in equity that the matter tendered for adjudication is wholly a controversy at all times existing between said Monetary Trust Company, a corporation, a citizen of California, and said H. C. Cutting also at all times a citizen of the State of California, and that the suit being for the benefit solely and only of said corporation, is cognizable in the State Court and not in the District Court of the United States, and the amount involved is but \$2,000.

Second. Said suit should be dismissed and said third amended bill stricken from the files:—

In that the plaintiffs have not, in and by their said third amended bill in equity, made or stated such a case as does or ought to entitle them, or either of them, to any such discovery or relief as is by them sought and prayed for from or against these defendants, or either of them.

Third. Said suit should be dismissed and said third amended bill stricken from the files:—

In that it appears by said third amended bill that the [25] same is exhibited by the plaintiffs against these defendants, and each of them, for sev-

eral distinct matters and causes, in many whereof, as appears by said third amended bill in equity, and that said third amended bill in equity is altogether multifarious, and, by reason of joining distinct matters and causes of suit together, the proceedings in the progress of said suit will be intricate and prolix, and no distinct cause of suit is separately stated, and that by reason thereof these defendants, and each of them, both individually and as aforesaid, would be put to unnecessary charges and expenses in matters which would cause the mixing of the several matters complained of, and in that behalf said defendants, and each of them, specify the following:—

(a) In that it is attempted to set forth an alleged equitable cause of action in favor of the defendant, Monetary Trust Company, for the annulling of the sale of certain shares of the capital stock of the Point Richmond Canal and Land Company theretofore claimed by plaintiffs to have been the property of said Monetary Trust Company, without asking for an accounting or any other relief in favor of said Monetary Trust Company, and failing wholly and fully to state a cause of action in equity for setting aside and nullifying said alleged sale of said capital stock, which transaction is complained of and attempted to be mixed with another and different attempted alleged cause of equitable action for an accounting of the business affairs of the Point Richmond Canal and Land Company, in which corporation it is not claimed or alleged that the plaintiffs have or ever had any stock or shares.

(b) In that it is also attempted to set forth and allege an equitable cause of action against the Point Richmond Canal and Land Company, and asking for an accounting against said defendants [26] for and on account of said Point Richmond Canal and Land Company without it being made a party defendant, and without it being first shown and positively alleged that said plaintiffs have any interest in, or right to, an accounting with or of said Point Richmond Canal and Land Company, and in that said third amended bill in equity, does not state facts sufficient to constitute a cause of action in equity or otherwise, against said Point Richmond Canal and Land Company.

(c) In that it is attempted to set forth in said third amended bill in equity two claimed alleged causes of action against the defendant, H. C. Cutting, one on account of The Monetary Trust Company, in which said Point Richmond Canal and Land Company is not interested, and a second alleged cause of action in favor of the Point Richmond Canal and Land Company, in which said Monetary Trust Company is not interested, and which alleged cause of action against the said Point Richmond Canal and Land Company, without it being made a party hereto, cannot be maintained until it is first proven and a decree of court entered showing that said Monetary Trust is or was a stockholder of said Point Richmond Canal and Land Company; therefore, these defendants, and each of them, claim that said third amended bill in equity is multifarious.

Fourth. Said suit should be dismissed and said third amended bill in equity stricken from the files:

In that it fully appears that said plaintiffs are guilty of laches in that it appears that the act complained of in selling the capital stock of the Point Richmond Canal and Land Company occurred in October, 1906, and in that no suit had been brought in the meantime to set aside said sale, and in that it appears that said first amended bill in equity in this suit was [27] not filed until the 19th day of February, 1913, and that by reason thereof, said defendants allege that plaintiffs' causes of action are barred.

Fifth. In that plaintiffs' alleged causes of action are barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California.

Sixth. In that plaintiffs' alleged causes of action are barred by the provisions of section 343 of the Code of Civil Procedure of the State of California.

Seventh. In that plaintiffs' alleged causes of action are barred by the provisions of section 359 of the Code of Civil Procedure of the State of California.

That upon the hearing of this motion said defendants will refer to and read this motion, plaintiffs' said third amended bill in equity, the notice of the hearing of this said motion, and the records in said cause.

WHEREFORE, these defendants jointly and severally pray the Court:

1. To dismiss said suit for want of jurisdiction in

said court to hear and determine the matters therein attempted to be litigated.

2. That the Court dismiss said suit for want of equity.

3. That the Court dismiss said suit and strike said third amended bill in equity from the files of said court for the reasons and upon the grounds hereinbefore set forth.

San Francisco, California, February 9th, 1914.

WM. H. H. HART,

Solicitor for Certain Defendants. [28]

Service of a copy of the within notice of motion and motion, etc., is hereby admitted this 10th day of February, 1914.

CLAYBERG & WHITMORE,

Solicitors for Plaintiffs. [29]

Amendment to Third Amended Complaint.

Comes now the plaintiffs in the above-entitled action and file this their amendment to the third amended complaint, as follows:

Amend line 9, on page 2, of said third amended complaint, so that same shall read as follows:

“Of costs and interest the sum of Three Thousand Dollars (\$3,000).”

Dated this 16th day of February, 1914.

CLAYBERG & WHITMORE,

Attorneys for Plaintiffs. [30]

**Stipulation [that Amendment to Third Amended
Complaint may be Filed, etc.].**

It is hereby stipulated that plaintiffs may file the annexed amendment to their third amended complaint, and the verification of such amendment is hereby expressly waived.

Dated the 16th day of February, 1914.

CLAYBERG & WHITMORE,
Attorneys for Plaintiffs.
WM. H. H. HART,
Solicitor for Defendants.

Due service and receipt of a copy of the within Amendment to Bill is hereby admitted this 17th day of February, 1914.

WM. H. H. HART,
Solicitor for Defendants. [31]

At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 30th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

Order Denying Defendants' Motion to Dismiss, etc.

Defendants' motion to dismiss and to strike from the files, the third amended bill of complaint, as amended; heretofore heard and submitted, being now

fully considered and the Court having rendered its oral opinion thereon; it was ordered that said motion be and the same is hereby denied. [32]

Answer to Third Amended Bill of Complaint.

The joint and several answer of the Monetary Trust Company, a corporation, and Henry C. Cutting, defendants, to the third amended bill of complaint of the above-named plaintiffs, Henry J. Woodward and Francis A. Woodward, complainants:

These defendants, and each of them, now and at all times hereinafter saving and reserving to themselves, and each of them, all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said third amended bill of complaint contained, for answer thereunto, or to so much or such parts thereof as these defendants are, and each of them is advised is material for them, and each of them, to make answer unto, they and each of them, answer and say:

First. Answering paragraph 1 of said third amended bill of complaint these defendants, and each of them, admit that said complainants, and each of them, were at all times mentioned in said third amended bill of complaint citizens of the United States and of the State of Illinois and residents of said State of Illinois.

These defendants, and each of them, further answering said paragraph 1 say that they, and each of them, admit that the [33] said Henry C. Cutting, is now, and was at all the times stated in said third

amended bill of complaint, a citizen of the United States and of the State of California and a resident of said State of California and of the Northern District of said State, and that the Monetary Trust Company, at all times mentioned in said third amended bill of complaint was and is now a corporation organized and existing under and by virtue of the laws of the State of California and has, and had, at all times its principal place of business in the city and county of San Francisco within said State of California, and within the Northern District thereof; that the said defendant, Monetary Trust Company, is now and was at all times stated in said third amended bill of complaint a citizen of said State of California, and a resident of said State and of said Northern District thereof.

These defendants, and each of them, further answering said paragraph 1, say that they deny that the amount of the controversy between the plaintiffs and the defendants herein and in this action, exceeds, exclusive of costs and interest, the sum of Two Thousand Dollars (\$2,000).

These defendants, and each of them, further answering said Paragraph of said third amended bill of complaint, deny that this action is or was brought by the plaintiffs for or on behalf of themselves, and any, or any, and all, or all other stockholders of the defendant, Monetary Trust Company, similarly or otherwise, situated, whom may or might join with said plaintiffs in said action.

Second. In answer to paragraph II of plaintiffs' said third amended bill of complaint, these defend-

ants deny, and each of them denies, that this suit is not a collusive one [34] to confer on a court of the United States jurisdiction of a case of which it did not have cognizance, or otherwise, or at all, not collusive.

In further answer to said paragraph II these defendants deny, and each of them denies, that prior to the bringing of this action, or continuously for three (3) months theretofore, or otherwise, or at all, plaintiffs, or either of the, requested or demanded of the board of directors, or the manager, or the other officers, or any officer of the defendant, Monetary Trust Company, or of each or any of them, that proceedings be at once, or otherwise, or at all, instituted, or that an action be at once, or otherwise, or at all commenced or prosecuted with, or without, diligence in the name of or in favor of The Monetary Trust Company to establish the right, or any right, to relief of said defendant, The Monetary Trust Company, or that the plaintiffs as in said third amended bill of complaint alleged, or otherwise, sought, or are seeking, to procure a decree granting said or any relief.

Said defendants, and each of them, further answering said paragraph II deny that the defendant, Monetary Trust Company, or each, or all, or any of its officers or directors, have uniformly, or at all times, or at any time, refused to institute any proceedings of any character against said defendant, Henry C. Cutting, for the purpose of establishing the rights of plaintiffs, or either of them, or of said defendant, Monetary Trust Company, to compel said de-

defendant, Henry C. Cutting, to account to said defendant, Monetary Trust Company, or to said plaintiffs, or either of them, or to the stockholders of said company, or any of them, for the assets or funds of said defendant, Monetary Trust Company, or to attack the validity of a certain pretended [35] sale, or any sale, by the officers, or any officer of said defendant, Monetary Trust Company, to the said Henry C. Cutting, of eleven hundred and seventy-five (1175) shares, or any other number of shares, or any shares, or share of the capital stock of the Point Richmond Canal and Land Company, as in said third amended bill of complaint alleged.

Said defendants, and each of them, further answering said paragraph II say that they know not, and each of them knows not, and that they have not, and each of them has not been informed, save by said complainants' third amended bill, and cannot set forth as to their, or his, or its belief, or otherwise, whether said plaintiffs also, or at all, negotiated with numerous stockholders, or any stockholder of said defendant, Monetary Trust Company, endeavoring to induce such stockholders, or each, or any of them, to either take proceedings in their own names, or to join with plaintiffs in this proceeding and action, or otherwise, for the purpose of establishing the rights of the defendant, Monetary Trust Company, and the plaintiffs herein, and the other stockholders of said defendant company, as in said third amended bill of complaint alleged, and therefore, said defendants, and each of them, deny said statements generally and specifically.

These defendants further answering said paragraph II deny that a majority of the directors or officers of defendant, Monetary Trust Company, are now, or always have been, or ever were under the complete control, or under any control or domination of the defendant, Henry C. Cutting, or that the majority, or any portion of the stockholders of said defendant, Monetary Trust Company, have been, or now are, under the complete control, or any control, and domination of said defendant, Henry C. Cutting.

[36]

These defendants further answering said paragraph II admit that none of said stockholders, or officers of said defendant, Monetary Trust Company, have taken any steps, or steps to bring suit, or institute any proceedings to establish the rights of defendant, Monetary Trust Company, and of said plaintiffs, and the other stockholders of said defendant, Monetary Trust Company, or to protect said plaintiffs by a proper, or any, decree of the Court.

These defendants further answering said paragraph II. deny that they have neglected or refused to bring any action or proceeding where the same was necessary or requisite for the maintenance of the rights of the stockholders of said corporation defendant.

These defendants further answering said paragraph II deny that the directors, or officers, of defendant, Monetary Trust Company, are, or ever were, under the control of the defendant, Henry C. Cutting, and deny that they, or any of them, are

not the *bona fide* owners and holders of shares of the capital stock of said company, or that sufficient shares of stock in said company to qualify said officers in accordance with the By-laws of said company have been issued to each of them by said defendant, Henry C. Cutting, or that through his influence or command, or in order that he might control the majority of the board of directors of said defendant, Monetary Trust Company, or its other officers.

Third. These defendants, and each of them, answering paragraph III of said third amended bill of complaint, say and each of them says: That they know not, and he and it knows not, and have not, and has not, been informed save by said complainants' [37] third amended bill, and cannot set forth as to their and his, and its belief, or otherwise whether the said complainants have truthfully set forth the matters in said paragraph mentioned, and in that behalf said defendants deny, and each of them denies, that the said Henry J. Woodward, one of the plaintiffs therein, became the equitable owner or holder, for a valuable consideration, or otherwise, of about six hundred (600), or any other number of shares of the par value of One Hundred Dollars (\$100) each, or of any other par value, of the capital stock of said defendant, Monetary Trust Company, on or about the 5th day of January, 1905, or at any other time, or that said Henry J. Woodward is now, or ever was, at all or any of the times stated in said third amended bill of complaint, the *bona fide*, equitable owner or

holder of said stock, or any part thereof, for a valuable consideration, or otherwise.

These defendants, further answering said paragraph III, deny that said Francis A. Woodward, one of the complainants herein, became the legal owner, or holder for a valuable consideration, or otherwise, of five (5) or any other number of shares of the par value of One Hundred Dollars (\$100), or of any other par value each of the capital stock of said defendant, Monetary Trust Company, on or about the 5th day of January, 1905, or at any other time, or at all, or that said F. A. Woodward is now, or ever was, at all or any of the times stated in said third amended bill of complaint, or has been the *bona fide*, or legal owner, or holder of said stock, for a valuable consideration, or otherwise, or at all, or that the plaintiffs herein were, or that each of them, was, a *bona fide* owner of said stock in the defendant corporation, Monetary Trust Company, at the time of each and all of the transactions complained of in said third amended bill.

These defendants further answering said paragraph III, admit that the Monetary Trust Company was the owner and holder [38] of eleven hundred and seventy-five (1175) shares of the par value of One Hundred Dollars (\$100) each of the capital stock of the Point Richmond Canal and Land Company, on and before the 20th day of December, 1906.

These defendants further answering said paragraph III deny that said defendant, Monetary Trust Company, ever since has been, or now is, the *bona fide* owner or holder of said eleven hundred

and seventy-five (1175) shares of its capital stock, or any part thereof, or has a full, or free, or clear title thereto.

These defendants further answering said paragraph III deny that such title to said shares is clouded by the acts of the defendants, or any act of the defendants, or either of them, as alleged in said third amended bill of complaint, or otherwise, or at all.

Fourth. These defendants answering paragraph IV of said third amended bill of complaint deny that said defendant, Henry C. Cutting, did not pay the par, or actual, or market value of said stock in cash, or turn over, or transfer to said defendant, Monetary Trust Company, any property, or rights, or perform any services, or services equal in value to the said stock.

These defendants further answering said paragraph IV deny that the defendant, Henry C. Cutting, acquired said stock without the payment of any sufficient cash consideration therefor, or turning over, or transferring to said company property, or rights, or performing services, or service for said company as a sufficient payment for, or upon said capital stock.

These defendants further answering said paragraph IV deny that said defendant, Henry C. Cutting, promised, or agreed with the defendant, Monetary Trust Company, and its officers, in that behalf duly authorized, at or before the time any of said stock was issued to him, that he would pay into the treasury of the [39] defendant, Monetary

Trust Company, Ten Dollars (\$10) per share for five hundred (500) shares of said stock, and (or) would also finance said company and place it in such a condition that it could safely proceed with its business in a proper method and manner.

These defendants further answering said paragraph IV deny that said Henry C. Cutting has failed to comply with, or perform his said agreement, or that he has only paid into the treasury of the company a few hundred dollars, but on the contrary said defendants allege that he has fully complied with his said contract and agreement,

Fifth. Answering paragraph V of said third amended bil of complaint these defendants, and each of them, deny that the records of the defendant, Monetary Trust Company, are assumed records.

Deny that the meeting of the board of directors of said Monetary Trust Company held on or about the 20th day of December, 1906, was an assumed meeting or that the records thereof were, or are assumed records, or an assumed record of said meeting, or of said Monetary Trust Company.

These defendants further answering said paragraph V admit that the records of said defendant, Monetary Trust Company, contained a statement that the following resolution was unanimously passed by the board of directors, viz.: "Mr. H. W. Wernse presented the check of H. C. Cutting for \$1,175 stating that Mr. Cutting desired to exercise his rights under the option given him by the Monetary Trust Company ratified and confirmed by the stockholders at their last meeting to purchase

1175 shares of the Point Richmond Canal and Land Company stock, held by The Monetary Trust Company, at \$1.00 per share.”

These defendants further answering said paragraph V deny that according to the By-laws of said company defendant the meeting held on the 20th day of December, 1906, was not a regular [40] meeting of the board of directors of the defendant, Monetary Trust Company.

These defendants further answering said paragraph V. deny that such meeting was not properly called in accordance with the By-laws and the statutes of the State of California.

These defendants further answering said paragraph V deny that the record of said meeting discloses that there were present at said meeting only directors Henry C. Cutting, one of the defendants herein, W. J. Morgan and H. W. Wernse, or that directors Albert Betz or H. B. Mayo, or either of them, were absent.

These defendants further answering said paragraph V admit that in accordance with the said By-laws of said corporation defendant three (3) Directors are required to be present to constitute a quorum for the transaction of any business and that as shown and disclosed by said record of said meeting the above recited resolution was passed unanimously and so voted for by Directors W. J. Morgan, H. W. Wernse and the defendant, Henry C. Cutting.

These defendants deny that said record is an assumed record of said meeting.

These defendants further answering said paragraph V admit that said Henry C. Cutting participated in the vote passing said resolution and voted for the passage of the same; and that under and by virtue of said resolution above quoted said defendant, Henry C. Cutting, claims that he became a *bona fide* owner and holder, for a valuable consideration, of the 1175 shares of the capital stock of the Point Richmond Canal and Land Company.

These defendants further answering said paragraph V deny that the said defendant, Henry C. Cutting's vote was necessary to the passage of said resolution, or that said defendant, Henry C. Cutting, was a disqualified director, or was not allowed to vote thereon. [41]

These defendants further answering said paragraph V deny that the said 1175 shares of the capital stock of the Point Richmond Canal and Land Company were on the 20th day of December, 1906, or for a long time prior thereto, of great value or of the par value of \$100 per share, or any other sum greater than \$1.00 per share.

These defendants admit that the shares at the present time are of a much greater value than \$1.00 per share, but the real and tangible value thereof said defendants are unable to admit or affirm at this time, or at any time since December 20th, 1906.

These defendants deny that said stock on said 20th day of December, 1906, or for long prior thereto, was or had been at any time practically the only asset of the defendant, Monetary Trust Company, of any appreciable monetary value.

These defendants further answering said paragraph V in that behalf allege that said shares on the 20th day of December, 1906, were of no greater value than \$1.00 per share, and that on November 5th, 1906, the said defendant, Henry C. Cutting, obtained from one A. N. Lewis an option for the purchase of two hundred and fifty (250) shares of the said Point Richmond Canal and Land Company stock at \$1.00 per share, said stock to be taken and paid for within sixty (60) days following November said 5th, 1906; that within said sixty (60) days the said defendant, Henry C. Cutting, availed himself of said option and purchased and paid for said two hundred and fifty (250) shares of stock at the price of One Dollar (\$1.00) per share.

These defendants further allege in answer to paragraph V that the defendant, Henry C. Cutting, on or about the 29th day of August, 1906, obtained from one Fred Reichert an option, privilege and right to purchase from said Fred. Reichert an option eleven hundred and eighty five (1185) shares of the capital stock of the Point Richmond Canal and Land Company at the price of One Dollar (\$1.00) per share; and that said option was to continue [42] from and including said date until and including the first day of May, 1907, and that the said defendant, Henry C. Cutting, under the terms of said option, had the right to avail himself of said privilege and the right to purchase said stock at any time without any further conference with said Reichert, and by applying said purchase price to the extent of Nine Hundred and Eight Dollars (\$908), upon an indebtedness owed by said Fred. Reichert to said Henry C. Cut-

ting; that thereafter and within the time specified the said defendant, Henry C. Cutting availed himself of said option.

These defendants further answering said paragraph V deny that said resolution was not properly or not legally passed by said board of directors of the defendant, Monetary Trust Company, and deny that said resolution was insufficient to transfer or give no authority to transfer to said defendant, Henry C. Cutting, said eleven hundred and seventy-five (1175) shares of stock of the Point Richmond Canal and Land Company, or any part thereof.

These defendants further answering said paragraph V deny that the check of the defendant, Henry C. Cutting, mentioned in the above quoted resolution was never cashed by the defendant, Monetary Trust Company, or by any of its officers, or anyone acting in its behalf, or that the same was returned to said defendant, Henry C. Cutting, or that he then or there pretended to borrow the same amount from the defendant, Monetary Trust Company.

These defendants further answering said paragraph V admit that said defendant, Henry C. Cutting, borrowed said sum of Eleven Hundred and Seventy-five Dollars (\$1,175), the proceeds of said check, from the defendant, Monetary Trust Company, and gave his note to the defendant, Monetary Trust Company, for the same amount that was specified in said check, to wit, the sum of Eleven Hundred and Seventy-five Dollars (\$1,175), which note is still outstanding, but these de-

defendants deny that said note is [43] wholly unpaid, but on the contrary allege that the interest has been paid on said note to the date of the commencement of this action, and One Hundred and Seventy-five Dollars (\$175) of the principal, leaving still remaining the sum of One Thousand Dollars (\$1,000) unpaid on said note, and drawing interest at the rate of eight per cent (8%) per annum, as provided therein.

Said defendants further answering said paragraph V admit that it is recited in the resolution above quoted that the defendant, Henry C. Cutting, decided to exercise his right under the option given to him to purchase said eleven hundred and seventy-five (1,175) shares of the stock of the Point Richmond Canal and Land Company.

These defendants further answering said paragraph V deny that in truth or in fact no option of any kind had at any time, or has since that time, or at all, been given to said defendant, Henry C. Cutting, or any other persons or person to purchase said stock from the defendant, Monetary Trust Company.

These defendants further answering said paragraph V deny the fact that no stockholders' meeting was held at or about that time, to wit, the 20th day of December, 1906, or at any other time ratifying said transaction, but in that behalf said defendants allege that more than three-fourths of the stockholders of said Monetary Trust Company ratified and confirmed the sale of said stock.

These defendants further answering said para-

graph V deny that there are no minutes in the minute-books of said defendant, Monetary Trust Company, of any meeting of the stockholders of said company at or about or before the 20th day of December, 1906, and deny that there is no record in any of the minutes of any of the meetings of the stockholders of said defendant, Monetary Trust Company, in any way referring to the granting, or confirming, or ratifying of any option for the purchase of said eleven [44] hundred and seventy five (1175) of stock in the Point Richmond Canal and Land Company, or any part thereof, or any mention of any ratification, or confirmation of any option given by said defendant, Monetary Trust Company, or anyone in its behalf.

These defendants further answering said paragraph V deny that said resolution above quoted and set forth in said third amended bill of complaint, in paragraph V thereof, set forth other matters or facts which did not exist, or was passed for the fraudulent purpose of allowing the defendant, Henry C. Cutting, to ostensibly or improperly acquire the right, or title of the defendant, Monetary Trust Company, in or to said eleven hundred and seventy-five (1175) shares of the capital stock of the Point Richmond Canal and Land Company, when in truth or in fact no sale of said stock had ever been legally authorized or made. These defendants deny that the defendant, Henry C. Cutting, had never paid anything upon the purchase price thereof, or that the entire transaction was fraudulently had by the defendant, Henry C. Cutting, and (or) the directors of the defendant,

Monetary Trust Company, or that said directors of The Monetary Trust Company, or either of them, were then, or ever since have been, or ever had been completely, or otherwise, or at all, under the control or domination of said defendant, Henry C. Cutting, for the purpose of cheating or defrauding the plaintiffs, or either of them, or of The Monetary Trust Company, or the other stockholders of said company, or any of them, out of all or any interest in said stock, or otherwise, or at all, but to the contrary said defendants allege that said directors, and each of them, of said Monetary Trust Company, never were under the control or domination of said defendant, Henry C. Cutting, or any other person.

These defendants further answering said paragraph V deny that for many years last past, or at any time, or at all, The Monetary Trust Company has not been engaged in the carrying [45] on of any regular business, or has not required the services of any salaried officers, or officer, in its employment.

These defendants further answering said paragraph V deny that said Henry C. Cutting, in the operation of carrying on his own private business, or otherwise, or at all, has ostensibly, or otherwise, or at all, caused his own private stenographer or secretary employed by him in his private business, to be employed by said defendant, Monetary Trust Company, on salaries which the said defendant, Henry C. Cutting, has fraudulently, or otherwise, or at all, caused to be paid out of the assets of said defendant, Monetary Trust Company.

These defendants further answering said paragraph V deny that the business of said defendant, Monetary Trust Company, has not for many years past, or at any time, required any office, and deny that said Henry C. Cutting has caused to be paid out of the assets of said defendant, Monetary Trust Company, large sums, or any sum whatsoever, for rent, or for offices, which he, the said defendant, Cutting, has used exclusively in his own behalf, or for his own private business.

These defendants further answering said paragraph V allege and show that no salary has been paid, or that no salaries have been paid by said Monetary Trust Company, for any service whatsoever rendered to said Henry C. Cutting, or any office rent or charges whatsoever for the private business or offices, or work of said defendant, Henry C. Cutting.

Sixth. These defendants, for answer to paragraph VI of said third amended bill of complaint, deny that said defendant, Monetary Trust Company, has ceased to transact any business, and deny that defendant, Henry C. Cutting, procured a majority or any of the directors of said company to be elected, who are, or were, or have been, completely, or otherwise, or at all controlled or dominated by said defendant, Henry C. Cutting, and deny [46] that said defendant, Henry C. Cutting, and said directors, or any of them, have purchased a large, or any amount of office furniture, or made elaborate, or expensive, or other, or any, changes, or change in the interior of said offices, or any of them, or purchased many hundred dollars worth of office supplies, or of any sup-

plies whatsoever, or that all of which, or any of which, were for the sole, or any use, or benefit of said defendant, Henry C. Cutting, or some, or any of the officers, or directors, or any of them, of the defendant, Monetary Trust Company, or that they, or any of them, are or always were, controlled, or dominated by him, the said Cutting, or not used by, or for the defendant, The Monetary Trust Company, or in its business.

These defendants further answering said paragraph VI deny that the said defendant, Henry C. Cutting, or the directors, or any of them, are, or were, controlled, or dominated by said Cutting, or have uniformly, or at all times, or at any time, or at all, caused payment for all, or any of such or any furniture or fixtures, or changes, or supplies, to be made out of the moneys or assets of the defendant, Monetary Trust Company, amounting to a large, or any sum of money, or that the exact amount of which cannot be ascertained from an examination of the books, or records of said Monetary Trust Company.

These defendants further answering said paragraph VI deny that the money so unlawfully, or otherwise, or at all, misapplied, or misappropriated, or appropriated, or otherwise, or at all, by Henry C. Cutting, exceeds the sum of Five Thousand Dollars (\$5,000), or any other sum whatsoever.

Seventh. These defendants answering paragraph VII of said third amended bill of complaint deny that by the official financial statement of the defendant, Monetary Trust Company, bearing date May 14th, 1913, the items set forth in paragraph VII con-

stituted all of the assets of said Monetary Trust Company, or that the liabilities were as stated in said paragraph VII.

These defendants further answering said paragraph VII [47] deny that there is nothing contained in said official financial statement which in any way or manner discloses the date of any of the respective notes mentioned therein or the consideration therefor; and deny that there is nothing contained therein which shows or discloses how or why the defendant, Monetary Trust Company, holds Ten Hundred and Ninety-three Dollars (\$1,093) and Three Hundred Seven and 51/100 Dollars (\$307.51) interest in trust for the Pacific Underwriting and Trust Company, nor whether the same is or has been held as notes, or obligations, if cash, or why, or how, or for what purpose any trust was ever created, or that any trust now exists, or has ever existed, or that plaintiffs are without any information in relation thereto.

These defendants further answering said paragraph VII admit that in said financial statement above quoted it is set forth that the note of W. H. H. Hart is secured for 100,000 shares of the capital stock of the Eldorado Gold Basin Dredging Company, but that said financial report fails to disclose that said note of W. H. H. Hart is also secured by 300 shares of the capital stock of The Monetary Trust Company; that at the time said note was given said W. H. H. Hart pledged and delivered to said Monetary Trust Company three hundred (300) shares of the capital stock of said company as security for the payment

of said note and the interest thereon, and that said three hundred shares so pledged should have been shown upon said financial report as having been pledged as security for the payment of said note; but deny that said three hundred (300) shares of stock so pledged by said W. H. H. Hart is a further asset of said Monetary Trust Company.

These defendants further answering said paragraph VII deny that the said defendant, Monetary Trust Company, has received since its organization large sums of money from the sale of its capital stock, or from other sources, or that such sums in [48] the aggregate amount to over Fifteen Thousand Dollars (\$15,000), or any other sum.

These defendants further answering said paragraph VII deny that all the legitimate expenses, or outlays of said Monetary Trust Company, during the time it was doing business, determined from a very liberal or any estimate would not exceed the sum of Three Thousand Dollars (\$3,000), but to the contrary would amount to much greater sums, the amount of which these defendants are at this time unable to state.

These defendants further answering paragraph VII deny that said defendant, Henry C. Cutting, has fraudulently, or otherwise, or at all, misapplied, or misappropriated, or dissipated all or any of the assets of said defendant, Monetary Trust Company.

Eighth. Answering paragraph VIII of said third amended bill of complaint, these defendants, and each of them, deny that shortly after the defendant, Henry C. Cutting, had agreed to purchase five hun-

dred (500) shares of stock of the defendant, Monetary Trust Company, at and for Ten Dollars (\$10) per share, said company undertook the organization and promotion of the Point Richmond Canal and Land Company; that said Monetary Trust Company paid all of the expenses of the organization of said Point Richmond Canal and Land Company.

These defendants further answering said paragraph VIII deny that the Monetary Trust Company became the owner of an option or contract to purchase four hundred (400) acres of land, or any land, in Point Richmond known as the South Marsh, situate in Contra Costa County, State of California, for any sum whatsoever.

These defendants further answering said paragraph VIII aver and admit that Fred. Reichert became and was the owner of an option or contract to purchase four hundred (400) acres of land in Point Richmond known as the South Marsh, situated in Contra [49] Costa County, State of California, for Three Hundred and Thirty-six Thousand Dollars (\$336,000) out of Four Hundred Thousand Dollars (\$400,000) worth of bonds secured on said real estate to be purchased. That the defendant Monetary Trust Company, obtained said option or contract from Fred. Reichert; that there was an agreement and understanding between The Monetary Trust Company, and said Reichert, that all of the capital stock of the Point Richmond Canal and Land Company should be issued.

These defendants further answering said paragraph VIII deny that the stock of said Point Rich-

mond Canal and Land Company should be issued one-fourth to said Reichert, one-fourth to said Mayo, and one-half to said Monetary Trust Company, but in that behalf these defendants allege that the directors of the Point Richmond Canal and Land Company were each to subscribe for and receive ten (10) shares, and that the balance of said stock was to be issued fifty-one per cent (51%) to the Monetary Trust Company and forty-nine per cent (49%) to said Reichert, or as he might direct.

These defendants further answering said paragraph VIII admit that before said corporation, Point Richmond Canal and Land Company, was organized it was agreed that it should be capitalized at five thousand (5,000) shares of the par value of One Hundred Dollars (\$100) per share.

These defendants further answering said paragraph VIII deny that defendant, Monetary Trust Company, should own or have one-half or any part or portion of the Sixty Four Thousand Dollars (\$64,000) worth of bonds of said Company out of the Four Hundred Thousand Dollars (\$400,000) worth of bonds so to be issued by the said Point Richmond Canal and Land Company.

These defendants further answering said paragraph VIII admit that said Four Hundred Thousand Dollars (\$400,000) worth of bonds were duly issued at the sole expense of the Monetary Trust [50] Company, and Three Hundred and Thirty-six Thousand Dollars (\$336,000) thereof were delivered to the owner of said land in payment of the purchase price thereof; and the remaining Sixty-Four Thousand

Dollars (\$64,000) worth of said bonds were owned by said Point Richmond Canal and Land Company and were intended to be used by it in the development and sale of said property.

These defendants further answering said paragraph VIII deny that subsequently to the issuance of said bonds The Monetary Trust Company turned over and delivered one hundred and fifty (150) shares of said stock in the Point Richmond Canal and Land Company to A. N. Lewis.

These defendants further answering said paragraph VIII admit that the said Point Richmond Canal and Land Company became the owner of the legal title in fee simple of all of said land subject only to the Four Hundred Thousand Dollars (\$400,000) worth of bonds which had been issued in payment of said property, and deny that said Monetary Trust Company became the owner of two thousand five hundred (2,500) shares of the said stock of said Point Richmond Canal and Land Company, ten (10) shares each to the Board of Directors, or said Fred. Reichert became the owner of twenty-four hundred and fifty (2450) shares of said stock of said Point Richmond Canal and Land Company.

These defendants further answering said paragraph VIII deny that immediately after said transaction, or at any other time, or at all, the defendant, Henry C. Cutting, proposed to The Monetary Trust Company that he would finance the Point Richmond Canal and Land Company or furnish all or any part of the funds necessary to develop or sell said lands, provided he could obtain the control of the stock of

said company, or otherwise, or at all, or that he would buy Ten Thousand Dollars (\$10,000) worth, or any other amount of the bonds, or that when that amount was spent he would raise whatever further money might be necessary, or that the [51] defendant, Monetary Trust Company, accepted said proposition, or any proposition, or delivered to said defendant, Henry C. Cutting, one-half of the twenty-three hundred and fifty (2350) shares, or any shares of the stock of the Point Richmond Canal and Land Company then owned by it.

These defendants further answering said paragraph VIII admit that said Henry C. Cutting procured sufficient stock to give to said defendant, Henry C. Cutting, a majority of all the capital stock of the Point Richmond Canal and Land Company then issued and the control of said Company.

These defendants further answering said paragraph VIII deny that the defendant, Monetary Trust Company, obtained an option, or contract, from Harry B. Mayo in reference to said land mentioned in said paragraph.

These defendants further answering said paragraph VIII deny that said defendant, Henry C. Cutting, paid nothing for said stock, or utterly, or otherwise, or at all, failed to carry out his agreement to buy Ten Thousand Dollars (\$10,000) worth of said, or any bonds, or failed to finance said Point Richmond Canal and Land Company, after he obtained control of said Company.

Ninth. Answering paragraph IX of said third amended bill of complaint, these defendants, and

each of them, deny that all, or singular, or any of the acts or doings of the defendant, Henry C. Cutting, as alleged, or otherwise, or at all, were, or are, or ever were fraudulent, or intended so to be, or were done or committed by said defendant, Henry C. Cutting, for the express, or any purpose, of cheating or defrauding the said Monetary Trust Company out of all, or any, of its assets, or property, or rights, or business, or of defrauding or cheating said plaintiffs, or either of them, or all the other, or any of the other stockholders, or any stockholder, out of their, his, her, or its rights, in or to any value in the assets, or any asset of said defendant, The [52] Monetary Trust Company, or that said defendant, Henry C. Cutting, purposely, or otherwise, or at all, intentionally, or otherwise, or at all, fraudulently, or otherwise, or at all, concealed his fraudulent practices, or practice, or any practices, or practice, in the performance of said, or any, acts, or doings, or any of them, from said plaintiffs, or either of them, or from the other stockholders, or any of them, by causing to keep, or did keep, insufficient, or inaccurate books of account, or any insufficient, or inaccurate book of account, or corporate record, or records, of the affairs of said company, or lulled said plaintiffs, or either of them, or the other stockholders, or any of them, into seeming, or other security by any statement, or statements made by him, or any other person, or at all, or that all, or any, of the stockholders of the defendant, Monetary Trust Company, should be, or would be, jointly, or otherwise, interested with him, the said Henry C. Cutting, in all, or any, profits

which might, or would, or could grow out of any of his transactions, or any transaction with, or pertaining to, the business, or property, or affairs of the defendant, Monetary Trust Company, or that he, the said Henry C. Cutting, should, or would hold the title of eleven hundred and seventy-five (1175) shares, or any other number of shares, or any shares, at all of the stock in the Point Richmond Canal and Land Company, in trust for said defendant, Monetary Trust Company.

These defendants, further answering said paragraph IX, deny that by said acts, or any act of said defendant, Henry C. Cutting, as alleged, or otherwise, or at all, in so far as the same, or any of them, were known to the plaintiffs, or either of them, or otherwise, or at all, they, or each of them, were made to believe or did believe that the acts, or any act of said defendant, Henry C. Cutting, as alleged, or otherwise, or at all, were for the best interests, or for any interest, of the defendant, Monetary [53] Trust Company, or all, or any of its stockholders.

These defendants, further answering said paragraph IX, admit that said defendant, Henry C. Cutting, was honest in the performance of all of his acts in connection with and appertaining to said Monetary Trust Company, and its affairs, and to said Point Richmond Canal and Land Company, and its affairs.

These defendants, further answering said paragraph IX, admit that said plaintiffs, and each of them, never made any careful, or other investigation of the books of account, or records of transactions of

said Monetary Trust Company, or ever applied to said company for any examination whatsoever of said records and transactions of said defendant, Monetary Trust Company, or of the acts or doings of said defendant, Henry C. Cutting.

These defendants, further answering said paragraph IX, deny that said plaintiffs, or either of them, or any other person, subsequently, or at all, discovered that said defendant, Henry C. Cutting, had been acting dishonestly, or fraudulently, with reference to the business affairs, or any affair, of the defendant, Monetary Trust Company, or with its assets, or any asset, or property, or with the stockholders of said company, or any of them, or that they did not discover said fraud, or any of said acts or alleged fraudulent practices, or any of them, until about the month of January, 1913, or that immediately after ascertaining the facts, or any of them, that the conduct of said Henry C. Cutting, as alleged, or otherwise, was fraudulent or intended for the purpose of defrauding the plaintiffs, or either of them, or for the purpose of defrauding The Monetary Trust Company, or the other stockholders, or any stockholder, of said company, out of all, or any of the property, or all, or any of the assets of said company, or the value of said stock, or any part thereof, or that plaintiffs, or either of them, instituted this suit for the purpose of submitting the entire matter to the Court, or protecting the value of their stock, or requiring [54] said defendant, Henry C. Cutting, to account for all, or any moneys, or property of the defendant, Mone-

tary Trust Company, which may have come, or did come into his hands since its incorporation, or to replace in the treasury of said company all, or any of the moneys, or stocks, or stock, or other securities or any of them, for the benefit of the stockholders, or any stockholder of said company, or to recover judgment or decree against said defendant, Henry C. Cutting, requiring him to answer for the same, or otherwise, or at all.

Said defendants, further answering said paragraph IX, deny that said defendant, Henry C. Cutting, was the president of the defendant, Monetary Trust Company, or became president thereof, until long after the purchase of said eleven hundred and seventy-five (1175) shares of the capital stock of said Point Richmond Canal and Land Company, from the defendant, Monetary Trust Company, on the 20th day of December, 1906.

These defendants, further answering said paragraph IX, deny that at all times mentioned in said bill of complaint, or at any of the times, or at all, the said defendant, Henry C. Cutting, acted in a fiduciary capacity for, or towards the plaintiffs or either of them, or for, or towards each, or any, stockholder of said company, with reference to the assets, or any asset, or property, or business, of said defendant, Monetary Trust Company, or that it was his duty, while acting in such fiduciary capacity, or otherwise, or at all, not to deal in, or with any of said assets, or asset, or property, or business, for individual benefit, or that said defendant, Cutting, was bound to, or obliged to conserve, or care for such assets, or any of

them, or care for such property or any of it, or such business, or any business, for the benefit or protection of said company, or of all, or any of its stockholders.

These defendants, further answering said paragraph IX, deny that said defendant, Henry C. Cutting, has openly, or otherwise, or at [55] all violated such duties, or any duty, or has misapplied, or misappropriated, or converted all or any of the assets, or any asset, or property, or business of said Monetary Trust Company to his own individual use, or benefit, as alleged in said third amended bill of complaint, or otherwise or at all.

These defendants, further answering said paragraph IX, deny that large amounts, or any amount of money, or any money, or any property, belonging to The Monetary Trust Company, have come into the possession of the defendant, Henry C. Cutting, or that said Henry C. Cutting has misapplied, or misappropriated, or converted the same, or any part or portion thereof to his own use.

These defendants, further answering said paragraph IX, deny that said plaintiffs have no plain, or speedy, or adequate remedy at law, or that by reason thereof said plaintiffs bring said third amended bill of complaint in a court of equity where all such matters of accounting or fraud are fully cognizable, but on the contrary said defendants allege that said plaintiffs have a full and adequate remedy at law of all matters of which they complain.

Tenth. These defendants, and each of them, further answering plaintiffs' third amended bill of com-

plaint, and in addition to the foregoing answer, aver that the cause of action, if any there be, arising to the complainants on account or by reason of the several allegations and complaints in their said third amended bill contained, did not accrue within three years prior to the filing of the original bill of complaint in this suit; and this allegation the defendants make in bar of the said complainants' bill and in bar of said complainants' said third amended bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

Eleventh. These defendants, and each of them, further answering plaintiffs' third amended bill of complaint, and in addition to the foregoing answer, aver that the cause of action, if [56] any there be, arising to the complainants on account or by reason of the several allegations and complaints in their said third amended bill contained, did not accrue within four (4) years prior to the filing of the original bill of complaint in this suit; and this allegation the defendants make in bar of the said complainants' bill and in bar of said complainants' said third amended bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

Twelfth. These defendants, and each of them, further answering plaintiffs' third amended bill of complaint, and in addition to the foregoing answer, aver that the cause of action, if any there be, arising to the complainants on account or by reason of the several allegations and complaints in their said third amended bill contained, did not accrue within

three (3) years before the bill of complaint was filed, and after the discovery by complainants of the alleged fraudulent acts of said defendant, Henry C. Cutting, and of facts sufficient to place complainants on notice thereof, and prior to the filing of the original bill of complaint in this suit; and this allegation the defendants make in bar of the said complainants' bill and in bar of said complainants' said third amended bill, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

Thirteenth. These defendants further answering said complainants' third amended bill of complaint allege that said plaintiffs are guilty of laches in that it appears that the act complained of in selling the capital stock of the Point Richmond Canal and Land Company occurred in October, 1906, and in that no suit had been brought in the meantime to set aside said sale, and in that it appears that said first amended bill in equity in this suit was not filed until the 19th day of February, 1913, and that by reason thereof, said defendants allege that plaintiffs' causes [57] of action are barred.

Fourteenth. These defendants, further answering plaintiffs' third amended bill of complaint alleged that this suit was and is a collusive suit on the part of said complainants in that the same was brought in collusion with one H. B. Mayo for the purpose of giving this Court jurisdiction, when in truth and in fact said suit is being prosecuted at the instance and for the benefit of said H. B. Mayo, as well as of said complainants, and that by reason thereof

this Court is without jurisdiction to hear or try or determine said action.

These defendants for further answer to plaintiffs' third amended bill of complaint deny all unlawful combination and confederacy in the said bill charged, without that any other matter or thing material or necessary for these defendants to make answer unto, and not herein and hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

WM. H. H. HART,
Solicitor for Defendants.

[Endorsed]: Filed Apr. 29, 1914. [58]

*In the District Court of the United States, Northern
District of California, Second Division.*

EQ.—No. 2.

HENRY J. WOODWARD and FRANCIS A.
WOODWARD,

Plaintiffs,

vs.

HENRY C. CUTTING and THE MONETARY
TRUST COMPANY, a Corporation,
Defendants.

Interlocutory Decree.

This cause having been heretofore heard and submitted, and the Court being duly advised:

IT IS ORDERED, ADJUDGED AND DECREED that the contract purporting to have been entered into on or about December 20, 1906, between certain members of the board of directors of the defendant The Monetary Trust Company, and the defendant Henry C. Cutting, which purports to transfer 1,175 shares of the capital stock of the Point Richmond Canal and Land Company, a California corporation, from the defendant The Monetary Trust Company to the defendant, Henry C. Cutting, was and is fraudulent and void, and vested no title to said shares of stock in said Cutting, but said shares of stock still remain the property of The Monetary Trust Company, and the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal and Land Company;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Henry C. Cutting has no title or right of property in or to the income, profits, dividends, or benefits of any character received by, or derived to the benefit of, said defendant from or on account of said 1,175 shares of the capital stock of the said Point Richmond Canal and Land Company since the said attempted transfer thereof to said defendant, or while the same has stood in his name; and the plaintiffs, on behalf of said Monetary Trust Company, are entitled to have an accounting from the defendant of [60] all such profits,

dividends, or benefits, if any, which have been received or derived by, to, or for the benefit of said defendant from said stock;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs, for and on behalf of said Monetary Trust Company, are entitled to an accounting from the said defendant, Henry C. Cutting, of all moneys due and owing, if any found, from said defendant to said Monetary Trust Company for and on account of that certain other 1,175 shares of the capital stock of said Point Richmond Canal and Land Company sold and transferred by said Monetary Trust Company to said defendant previously to said 20th day of December, 1906, and likewise a full accounting of any and all bonds, evidences of indebtedness, and interest, or income therefrom, and of all other property of every kind of said Monetary Trust Company, if any, which may be found to have been taken by or have come into the possession of said defendant Henry C. Cutting, and of any and all sums of money or funds of said Monetary Trust Company paid, laid out or expended by or on behalf of said defendant on account of office or room rents, or other expenses of any character, or of any sums of money whatsoever belonging to said Monetary Trust Company in any wise appropriated to the use or benefit of said defendant Henry C. Cutting; and generally to an accounting of all financial or money transactions of any and every character had and occurring between said Monetary Trust Company and said defendant Henry C. Cutting during the period covered by the bill herein;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs, on such accounting, be entitled to cause and have the examination of the defendant Henry C. Cutting and the officers and directors of the defendant, The Monetary Trust Company, *ore tenus*, or otherwise, and also to cause the production of books, vouchers, and documents of the defendant Henry C. Cutting and the defendant The Monetary Trust [61] Company in any way relating to the transactions herein covered;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs have and recover on behalf of said Monetary Trust Company from the defendant Henry C. Cutting all sums found on such accounting to be due from said defendant to said Monetary Trust Company, together with their costs, charges, and disbursements in this suit to be taxed.

Dated this 6th day of October, 1915.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed and entered Oct. 6th, 1915.
[62]

Substitution of Solicitors for the Defendant, Henry C. Cutting.

The defendant in the above-entitled suit, Henry C. Cutting, hereby substitutes Jacob M. Blake, Esq., as his solicitor therein in the place and stead of W. H. H. Hart, Esq.

H. C. Cutting—Oct. 6, '15.

I hereby consent to the substitution of Jacob M. Blake, Esq., as solicitor for the defendant, Henry C. Cutting, in the above-entitled action, in my place and stead.

Oct. 6th, 1915.

WM. H. H. HART.

The substitution of myself as the solicitor for the defendant, Henry C. Cutting, in the above-entitled action in the place and stead of W. H. H. Hart, is hereby accepted.

San Francisco, Cal., October 7th, 1915.

JACOB M. BLAKE. [63]

Notice of Substitution of Solicitors.

To the Above-named Plaintiff and to Your Solicitors,
Clayberg & Whitmore:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE that Jacob M. Blake, Esq., has been
substituted as the solicitor of record for the defendant,
Henry C. Cutting, in the above-entitled suit.

San Francisco, California, October 7, 1915.

JACOB M. BLAKE,

Solicitor for the defendant, Henry C. Cutting.

Due service of the within notice of substitution of
solicitors and receipt of a copy thereof is hereby acknowledged at San Francisco, California, this 8 day
of October, 1915.

JNO. B. CLAYBERG,
CLAYBERG & WHITMORE,
Solicitors for Complainants. [64]

Notice of Time of Hearing of Petition for Rehearing.

To the Above-named Complainants, and to Clayberg & Whitmore, Esqs., Your Solicitors, and to the Above-named Defendant, Monetary Trust Company, and to your Solicitor, William H. H. Hart, Esq.:

YOU AND EACH OF YOU WILL PLEASE HEREBY TAKE NOTICE, That the defendant, Henry C. Cutting, in the above-entitled suit intends to and will petition and move for a rehearing herein, and that said petition will be brought on for hearing in the above-entitled court and cause on Monday, the 18th day of October, 1915, at the hour of ten o'clock A. M., of said day, or as soon thereafter as counsel can be heard, at the courtroom of said court, Second Division thereof, in the Postoffice Building at the corner of Seventh and Mission Streets, in the city and county of San Francisco, State of California.

Said motion will be based upon the petition for rehearing hereto attached and made a part of this notice of motion.

San Francisco, October 13th, 1915.

JACOB M. BLAKE,

Solicitor for the Defendant, Henry C. Cutting.

[65]

Petition for Rehearing.

To the Honorable WILLIAM C. VAN FLEET,
Judge of the Above-entitled court:

Your petitioner, Henry C. Cutting, respectfully

represents and shows this Honorable Court as follows:

1. That since the trial, argument and decision of the above-entitled suit in equity, your petitioner has discovered certain new evidence of which he did not know and could not have known by reasonable diligence at the time of the hearing of this suit; that said evidence is material to the proper trial of the issues herein and could not be produced at the trial because of accident and surprise which ordinary prudence could not have guarded against.

2. Your petitioner respectfully further represents that at the time of the trial he was not advised of any rule of the above-entitled court to the effect that the sole solicitor of record for your petitioner at said trial could not be a witness on behalf of your petitioner without waiving his right to be heard upon the argument of said cause; that only since the trial, argument and decision of the above-entitled cause has your petitioner been informed of the materiality of the testimony of the sole solicitor who represented him at the trial hereof and who was prevented from being a witness [66] thereat because of the operation of the aforesaid rule of court; that the action of his said solicitor at that time in electing to preserve his right to argue said cause instead of becoming a witness in behalf of your petitioner was entirely unexpected by your petitioner, and took place under circumstances, and has resulted in consequences which ordinary prudence and foresight could not have guarded against so far as your petitioner is concerned, and created a

condition of an entirely unexpected character which your petitioner was unprepared to meet and the detrimental result of which he was not in a position to anticipate.

3. That since the trial, argument and decision in the above-entitled cause your petitioner has been informed and he, therefore, alleges that proof of the following facts would have been material and relevant to rebut the charges of actual fraud contained in complainants' bill of complaint with reference to his alleged purchase of 1175 shares of the capital stock of the Point Richmond Canal & Land Company from the defendant, The Monetary Trust Company, on or about the 20th day of December, 1906:

(a) The fact that his sole solicitor of record at the time of the trial of the above-entitled cause, together with one Henry Mayo and persons other than your petitioner, were the substantial and beneficial owners and holders of record of approximately two-thirds of all the subscribed and issued capital stock of the Monetary Trust Company, and that all of said persons, other than your petitioner herein were, at the time of said alleged fraudulent purchase of said 1175 shares of Point Richmond Canal & Land Company's stock by your petitioner from said Monetary Trust Company, the substantial and beneficial owners and holders of record of said two-thirds of said capital stock of said Monetary Trust Company in approximately [67] the same proportions as it is now owned.

(b) That at all times subsequent to the organization of the Monetary Trust Company and prior to

said alleged fraudulent purchase of said 1175 shares of stock by your petitioner as aforesaid, and for more than six months after said alleged fraudulent purchase, your petitioner was a nonresident of the State of California and was a resident of the State of Nevada and engaged in conducting a large mercantile business at Tonopah in said State; that during all of said last-mentioned times he was rarely in the city and county of San Francisco, State of California, the place where the principal business of the Monetary Trust Company was carried on, and that during all of said times your petitioner was not engaged in any regular business or employment in said State of California and employed no attorney or counsel in said city and county of San Francisco or elsewhere in State; and that during all of said time your petitioner's solicitor of record in this case at the time of the trial was the general counsel and one of the executive committee of the defendant Monetary Trust Company, and that he is still the general counsel of said trust company. That said general counsel of said trust company did not become the personal counsel of your petitioner until long after the time of the alleged fraudulent purchase of said 1175 shares of stock by your petitioner from said trust company; that said general counsel for said trust company was one of its original organizers and promoters and has been from the beginning and still is, one of its substantial and principal stockholders.

(c) That your petitioner only agreed to take up the bonds of the Point Richmond Canal & Land

Company in the amount of approximately ten thousand dollars' worth after the Monetary Trust Company had called one Mr. Reichert to its assistance [68] and had failed to finance the Point Richmond Canal & Land Company, and that he purchased said amount of bonds from said Point Richmond Canal & Land Company upon the condition and with the understanding that he should receive 2350 shares of the stock of the Point Richmond Canal & Land Company as a bonus, and that The Monetary Trust Company should receive 1175 shares of the stock of the Point Richmond Canal & Land Company for the services already performed by the trust company in organizing and attempting to finance the Point Richmond Canal & Land Company, and that he never entered into any contract with the trust company for the purchase of land company bonds, nor into any agreement with the trust company to carry at his own cost and expense its interest in said 1175 shares of stock of the Point Richmond Canal & Land Company, or that he would buy any more bonds of the latter company for the purpose of improving the land company's lands at Point Richmond.

(d) That at the time of the transaction last aforesaid, to wit: on or about March 27th, 1905, the land of the Point Richmond Canal & Land Company was known by all of the stockholders of record of the Monetary Trust Company, including your petitioner's solicitor at the time of the trial, not to be worth anything like the amount of its bonded indebtedness, that the city of Richmond, California, near where the land of the company was situated and upon the

growth of which the value of the land depended, was not incorporated and had a population of about — people, and that the value of said land was not appreciably enhanced by the expenditure upon it for improvements of the proceeds of the sale to your petitioner of said ten thousand dollars' worth of bonds.

(c) That at the time of the alleged fraudulent purchase by your petitioner from the Monetary Trust Company of said 1175 shares of the stock of the Point Richmond Canal & Land [69] and to wit, on or about the 20th day of December, 1906, it was known to all the stockholders of record of the Monetary Trust Company that the said land of the Point Richmond Canal and Land Company was not worth the amount of the outstanding bonds against it, and that its value was entirely speculative and was dependent upon the future growth of said city of Point Richmond, and upon the expenditure upon said land of large sums of money for permanent improvements by way of dredging deep water channels and grading streets through, over and upon said land, and that at said time last aforesaid the said city of Richmond had a population of only — people; that each and all of said stockholders of record of said Monetary Trust Company knew that there was no way of raising money for the improvement of said land at the time last mentioned, save and except by assessing the stock of the Point Richmond Canal & Land Company or by selling its bonds; that each and all of said stockholders of record of said trust company and its general

counsel knew that there was no market for said bonds, and that your petitioner was the owner of two-thirds of all the capital stock of the Point Richmond Canal & Land Company, or that your petitioner had options on or had purchased 1175 shares of said stock from the said Reichert and 250 shares of said stock from one Lewis, the vice-president of the Point Richmond Canal & Land Company at the rate of One Dollar per shares, and that said stock gave your petitioner the control of more than three-fourths of all the subscribed and issued capital stock of said Point Richmond Canal & Land Company; that they also knew that the transfer of said stock from the said Reichert and the said Lewis to your petitioner involved, or would involve a *bona fide* sale thereof. [70]

(f) That some time prior to the alleged fraudulent purchase of said 1175 shares of the land company's stock from the trust company by your petitioner, your petitioner offered and proposed to all the stockholders of record and to the general counsel of said Monetary Trust Company that an assessment be levied upon the stock of the Point Richmond Canal & Land Company to raise money for development purposes; that said offer was not accepted by the Monetary Trust Company and the proposition was made to said trust company that your petitioner should purchase the 1175 shares of the Point Richmond Canal & Land Company stock owned by the Monetary Trust Company at the same price per share that your petitioner had bought the stock from the said Reichert and Lewis; that your peti-

tioner then and there inquired of the general counsel of the trust company if he could legally purchase said 1175 shares of stock from the Monetary Trust Company, and that he was advised by him that he could do so; that with the knowledge and consent of all the stockholders and directors of said Monetary Trust Company, the executive committee thereof by and through the secretary and general counsel, they being two out of three members of said executive committee, and about sixty days prior to said 20th day of December, 1906, gave your petitioner an option in writing to purchase said 1175 shares of stock at the price of one dollar per share and that said transfer of said stock from said trust company to your petitioner was a *bona fide* sale thereof for value on the part of both the said trust company and your petitioner.

(g) That thereafter and continuously from the date of said purchase of said 1175 shares of stock as aforesaid to the present time, and with the full knowledge, acquiescence and consent of all, and without any protest or dissent, except the filing of this suit, of any of the stockholders of record, or of any of the directors of the Monetary Trust Company, [71] your petitioner has held, controlled and voted said 1175 shares of stock in the Point Richmond Canal & Land Company as his own, and that, upon the strength of his faith in his legal ownership thereof, he has, with the full knowledge, acquiescence and understanding upon the part of all of the stockholders of record of said Monetary Trust Company and of its general counsel that your petitioner

claimed the said 1175 shares of stock as his own, expended large sums of his own money in the development and improvement of the property of the Point Richmond Canal & Land Company, and that during all of said last-mentioned time and to the date of the commencement of this suit, and with the knowledge, acquiescence, and understanding upon the part of all the other owners and holders of record of the stock of the Monetary Trust Company and of the general counsel of said company of your petitioner's claim of title to said 1175 shares of stock, your petitioner has been constantly changing his position in relation to the beneficial ownership of said 1175 shares of stock to his great financial injury and detriment, and to the equally great financial benefit of all the other owners of the capital stock of the Monetary Trust Company, if a rescission of the sale of said 1175 shares of stock is decreed in this suit; that the record ownership and the beneficial ownership, so far as the same is known to your petitioner, upon March 27th, 1905, the date of the transfer by the said Reichert of said 1175 shares of Point Richmond Canal & Land Company stock to the Monetary Trust Company, and upon the 20th day of December, 1906, the date of the sale of said stock by said trust company to your petitioner, and at the present time is, to the best of your petitioner's knowledge and belief as set forth in a summary, marked schedule A for identification, and hereto attached and made a part of this petition. [72]

4. That your petitioner, on information and belief, further *allege* that his sole solicitor of record

and only counsel at the trial of the above-entitled suit, William H. H. Hart, Esq., could have testified of his own knowledge of the truth of the foregoing facts, and as your petitioner is informed and believes, and therefore alleges, would have so testified, except for the rule of court aforesaid, and his said solicitor's waiver of his right to testify in said cause was without knowledge on the part of your petitioner of the materiality and relevancy of the foregoing facts as going to disprove material allegations of actual fraud contained in complainants' bill of complaint, and that if the trial of this suit is reopened for the taking of further testimony, the said William H. H. Hart, Esq., will appear and so testify affirmatively; that since the decision in the above-entitled cause and by *reason the* large beneficial interest which said Monetary Trust Company receives in the stock of the Point Richmond Canal & Land Company by the rescission of the sale of the aforesaid 1175 shares of the said company, and by reason of the fact that he is a beneficiary of said rescission, and always has been and now is the general counsel of said Monetary Trust Company, the said William H. H. Hart, Esq., has voluntarily resigned as solicitor and counsel for your petitioner and a substitution of solicitors has been made of record in the above-entitled suit; and that by reason thereof the said William H. H. Hart, Esq., upon a rehearing thereof will not be disqualified as a witness on behalf of your petitioner by reason of the rule of court aforesaid.

5. That only since the trial, argument and decision in the above-entitled suit has your petitioner

been advised that the proof of the foregoing facts would establish an estoppel *in pais* and prevent the complainant from obtaining any relief in said suit on behalf of the Monetary Trust Company by way of rescission of said [73] sale of said 1175 shares of stock or otherwise, and that in the interest of a full and complete defense of said suit, your petitioner's answer to complainants' bill of complaint on file herein should be amended to contain proper allegations setting up the necessary and foregoing facts to establish such an estoppel *in pais*; and your petitioner is informed and believes and, therefore, alleges that the record of the former trial is greatly deficient, if not entirely wanting, in the proof of any of the foregoing facts which would operate to establish an estoppel *in pais* against a suit by the Monetary Trust Company to have a rescission decreed of the sale of said 1175 shares of stock as aforesaid, and that the reason therefor is because of the disqualification of the said William H. H. Hart to testify on behalf of your petitioner at the former hearing arising out of the rule of court aforesaid, and because of accident and surprise which ordinary prudence on the part of your petitioner could not have guarded against.

6. That since the trial, argument and decision in the above-entitled suit, your petitioner has found one of the original duplicate agreements entered into on the 28th day of March, 1905, between the Point Richmond Canal & Land Company aforesaid and your petitioner relating to the original purchase of the aforesaid ten thousand dollars' worth of bonds of the

Point Richmond Canal & Land Company; that said contract was lost and its whereabouts was entirely unknown to your petitioner or to any officer or agent of said land company at the time of the former trial of this action; that said contract was and is material to the proper defense of this suit by your petitioner because it opposes and rebuts the claim of the complainants and the testimony of the witness, Henry B. Mayo, to the effect that your petitioner's contract to buy said bonds was with the Monetary [74] Trust Company and involved an agreement on the part of your petitioner that he would carry at his own cost and expense the interest of the Monetary Trust Company in said 1175 shares of the Point Richmond Canal & Land Company stock; that said contract contains no such agreement and was known by the witness Mayo to contain no such agreement as the same was executed in the name of the Point Richmond Canal & Land Company by Fred Rechert, President, and H. B. Mayo, Secretary; that a true and correct copy of said contract, marked Schedule B for Identification is hereto attached and made a part of this petition.

7. That since the trial, argument and decision of the above-entitled suit your petitioner has found two bank or pass-books issued by the Central Trust Company of California to the Point Richmond Canal and Land Company, one containing the entries of moneys deposited from May, 1905, to February, 1906, and the other containing entries of deposits subsequent to November, 1906, and for the years 1907 and 1908; that the book containing entries of deposits subse-

quent to November, 1906, shows that more than Fifty Thousand Dollars had been deposited in the interval above mentioned to the credit of said Point Richmond Canal & Land Company; that said bank-books are material and relevant evidence on behalf of your petitioner to show in connection with his testimony that he solely and alone contributed a large sum of money to the development of the properties of the Point Richmond Canal & Land Company after his purchase of said eleven hundred seventy-five shares of stock from the Monetary Trust Company, and that he contributed the same in reliance upon his legal ownership of said stock and that his purchase thereof was a *bona fide* transaction: That said bank-books were lost and their whereabouts were entirely unknown to your petitioner and to the officers and agents of the Point Richmond Canal & Land Company at the time of the trial of this action; and that neither the aforesaid contract [75] mentioned in paragraph 6 hereof or said *book books* could have been found or produced at the time of the trial with reasonable diligence on the part of your petitioner, or any officer or agent of said Point Richmond Canal & Land Company.

WHEREFORE your petitioner prays that a rehearing may be granted herein with leave to your petitioner to amend his answer to the complainants' bill of complaint on file herein, and with leave to take such additional testimony on the matters heretofore referred to as the Court may adjudge and decree to be proper, and that the Court shall fix a time within which such testimony may be taken on

the part of your petitioner, and such further time as may be proper to opposing parties to take evidence to rebut the same.

And your petitioner will ever so pray.

HENRY C. CUTTING,

Petitioner.

JACOB M. BLAKE,

Solicitor for Petitioner. [76]

SCHEDULE A.

Name.	No. Shares.	Beneficial Owner So Far as Known.
H. B. Mayo	605	H. B. Mayo
W. J. Morgan	65	W. J. Morgan
H. W. Wernse	155	H. W. Wernse
Albert Betz	55	Albert Betz
H. C. Cutting	125	H. C. Cutting
F. A. Woodward	5	H. A. Woodward
H. W. Wernse, Trustee	350	H. W. Wernse and W. H. H. Hart
Total	1360	

The foregoing being the state of the ownership of the Monetary Trust Company stock on March 27, 1905.

Name.	No. Shares.	Beneficial Owner So Far as Known.
H. B. Mayo	605	H. B. Mayo
W. J. Morgan	65	W. J. Morgan
H. W. Wernse	155	H. W. Wernse
Albert Betz	55	Albert Betz
H. C. Cutting	753	H. C. Cutting
W. H. H. Hart	10	W. H. H. Hart
F. A. Woodward	5	F. A. Woodward
H. W. Wernse, Trustee	350	H. W. Wernse (175) W. H. H. Hart (175)
	1998	

The foregoing being the state of the ownership of the Monetary Trust Company stock on December 20, 1915.

The present state of the stock ownership of the Monetary Trust Company is that of December 20, 1905, except that since that time Three Hundred Shares has been issued to W. H. H. Hart. [77]

SCHEDULE B.

THIS AGREEMENT made and entered into, in duplicate, this 28th day of March, 1905, by and between the Point Richmond Canal and Land Company, a corporation, duly organized, created and existing under the laws of the State of California with its principal place of business in the city and county of San Francisco and State aforesaid as the party of the first part, and H. C. Cutting of the same place as the party of the second part,

WITNESSETH:

That for and in consideration of the sum of one dollar (\$1.00) each to the other in hand paid, the receipt of which is hereby acknowledged, it is hereby agreed as follows, to wit:

First. Said party of the first part hereby agrees to sell and deliver to the said party of the second part, Thirteen Thousand Five Hundred Dollars (\$13,500), par value of the first mortgage bonds of the said party of the first part at the rate of seventy-five cents (75¢) on the Dollar (\$1.00) and said party of the first part FURTHER AGREES that it will on fifteen (15) days notice after June 1st, 1905, at the option of said party of the second part, transfer

and convey to him in payment for said bonds any then unsold lots or parcels of real estate at Point Richmond, belonging to said party of the first part excepting, however, therefrom the lots in Blocks A and B on the map of this company's property at said Point Richmond at the price provided in the mortgage for the release of said lots and to accept said bonds in payment therefor as provided in said mortgage given to secure said bonds.

Second. Said party of the second part hereby agrees to purchase said bonds upon the terms and conditions above specified and to pay therefor in sums and at times designated by the board of directors as may be necessary for the uses and [78] purposes of the company.

Third. Each of the parties hereto hereby *agree* to execute all papers, documents or deeds that may be necessary to carry out the provisions of this contract.

IN WITNESS WHEREOF, the said party of the first part has caused this agreement to be signed and executed by its officers duly authorized so to do by the board of directors of said company and to annex the seal of said company hereto and the said party of the second part has set his hand and seal

the day and year first above written.

POINT RICHMOND CANAL AND LAND
COMPANY.

By (Signed) FRED REICHERT,
President.

By (Signed) H. B. MAYO,
Secretary.

(Signed) H. C. CUTTING, (Seal.)

[Point Richmond Canal and Land Co.—Seal.]

[79]

**Affidavit [of Wm. H. H. Hart] in Support of Petition
for Rehearing.**

William H. H. Hart, being first duly sworn on oath
deposes and says:

That he is by profession an attorney at law, and
has been such for more than forty-five years last
past; that he drew the articles of incorporation of the
defendant, Monetary Trust Company, and has been
its general counsel ever since, and as such was famil-
iar with the business of the corporation so far as it
has conducted a business, and with the executive
committee of said corporation; defendant in the year
1906 consisted of H. C. Cutting, president of the cor-
poration; H. W. Wernse, cashier and trust officer
of the corporation, and this affiant, said committee
consisting of three, and the by-laws of said company
provided as follows:

ARTICLE Xa.

Executive Committee.

1st. For the purpose of facilitating the conduct-
ing of the business of this company, there shall be

appointed by the board of directors an executive committee of three persons.

2d. The president and chief counsel of the company shall [81] constitute two of said committee, and the board of directors shall select the third member of said committee from their number, or may select such other person as may be deemed for the best interests of the company.

3d. Said committee shall have full charge of and shall conduct and carry on the business of the company, and report its actions to the board of directors at the meeting of the board held next thereafter.

That in the months of August or September, 1906, upon a conference with the executive committee (consisting of H. C. Cutting, H. W. Wernse, and myself) and W. J. Morgan, and in view of the statement by Mr. Cutting that if the Monetary Trust Company expected to retain its shares in the Point Richmond Canal & Land Company then amounting to 1175 shares, that they must either buy their share of the bonds remaining unsold, or the Point Richmond Canal & Land Company would levy an assessment, and thereupon the Monetary Trust Company would have to pay its assessment on its 1175 shares; that he, Mr. Cutting, had purchased Mr. Lewis's stock at \$1.00 a share, and purchased stock from Mr. Reichert, and that he was willing to pay the Monetary Trust Company \$1.00 per share for the 1175 shares, which was something in excess of the money which had been expended by the trust company on account of the Point Richmond Canal & Land Company, and thereupon H. W. Wernse, cashier and

trust officer, and this affiant, constituting a majority of the executive committee, *thereupon the executive committee* executed a writtten option to sell to said H. C. Cutting said 1175 shars at \$1.00 per share; and thereafter on December 20th, 1906, the matter was considered by the board of directors, and Mr. Cutting availed himself of the option to purchase the same. [82]

Up to this time this affiant had not been counsel for Mr. Cutting in any matter except a small case in Justice Court involving the fit of a coat.

Up to September or October, 1906, I had seen but very little of Mr. Cutting. My recollection is that Mr. Cutting paid very little attention to business matters in San Francisco before sometime in 1907.

My general connection with Mr. Cutting has been as attorney for three corporations in which he is interested,—the Point Richmond Canal & Land Company, Monetary Trust Company and the Richmond Dredge Company, and wherever he has personally appeared in those suits, and where I have appeared for the corporation, that is practically the only cases where I have been his personal counsel, with the exception of the time that the Richmond Dredge Company and the Point Richmond Canal & Land Company were represented by J. L. Taugher for a period of about eighteen months.

My recollection is that the first \$10,000 of bonds of the Point Richmond Canal & Land Company were purchased by Mr. Cutting from that company about the 28th day of March, 1905; my recollection is that I drew the contract for that transaction.

I was well aware at the beginning of the transaction in connection with the organization of the Point Richmond Canal & Land Company and the securing of the property mentioned in this case, that the land was swamp and overflowed land, and that its value depended almost entirely upon its improvement, and even if improved, it could only become marketable as the town of Richmond might grow. I knew nothing about the sale being questioned up to about the time of bringing the suit.

WM. H. H. HART,

Subscribed and sworn to before me this 11th day of October, A. D. 1915.

[Seal]

LOUISE BEARDEN,

Notary Public in and for the City and County of San Francisco, State of California. [83]

Due service of the within affidavit in support of petition for a rehearing and receipt of a copy is hereby acknowledged at San Francisco, California, this 13th day of October, 1915.

WM. H. H. HART,

Solicitors for Defendant, Monetary Trust Company.

JNO. B. CLAYBERG and

CLAYBERG & WHITMORE,

Solicitors for Complainants. [84]

**Affidavit [of H. W. Wernse] in Support of Petition
of Rehearing.**

H. W. Wernse, being first duly sworn on oath, deposes and says:

That he is, and ever since the year 1906, has been

a director and the secretary and treasurer of the Point Richmond Canal and Land Company, and as the secretary and treasurer of the said Point Richmond Canal and Land Company, is the legal and actual custodian of all of the papers, records, files and books of account of said canal and land company.

That during the great fire in the city of San Francisco, in April, 1906, most of the books, papers and records of the Point Richmond Canal and Land Company were destroyed; but there was saved therefrom a bank deposit book of the Central Trust Company and a contract between the Point Richmond Canal and Land Company and H. C. Cutting, dated March 28, 1905, *between the Point Richmond Canal and Land Company and H. C. Cutting*, which provided for the purchase, by H. Cutting, of \$13,500 of the first mortgage bonds of the Point Richmond Canal and Land Company at seventy-five cents on the dollar.

At the time of the fire I visited the office of the company at #79 New Montgomery Street, at six o'clock A. M. and put all the books that I could get in, into the safe of the [85] Monetary Trust Company, and those that would not go in were destroyed.

Six weeks after the fire, when the safe was drawn out of the basement of the Crossley Building on New Montgomery Street, and into the street, I had it opened and took all of the charred papers and put them in two hampers which were taken to the Crocker Safe Deposit Co. and I visited the safe deposit company on different occasions to get some of the papers and each time I would have to move a

number of boxes and bundles that had been thrown upon our hampers. That vaults were crowded with papers the same as ours, and from that time on, as I visited the safe deposit company, at intervals of two or three months, I was destroying, throwing away and laying aside, papers which I was sure would never be used, because the safe deposit company was always requesting us to reduce the space we were occupying. It would always take from two to three hours to get at these papers in the Crocker Safe Deposit vaults, on account of the amount of stuff that was there, and it was a very disagreeable job.

At the time of the trial of this case I made diligent search for all papers relating to the transactions of H. C. Cutting with the Point Richmond Canal and Land Company, but owing to the moving of our office four different times since 1906, some of the papers that we thought were not necessary were destroyed at each moving, and those that were thought to be of use were moved to the new address.

In making a search for some records of recent date, during the last month, I came across an envelope containing a pass-book and contract of the Point Richmond Canal and Land Company. The pass-book shows seventy-five hundred dollars (\$7,500) of money received from the sale of bonds, provided for in the contract, and was in use up to the time of the fire; and the contract was the contract above referred to as of date of March 28, 1905. This [86] contract and pass-book were found in a place that I would never have looked for any papers relating to

the Point Richmond Canal and Land Company. The other pass-book which was used after the fire was found in a box containing old bills and books which were considered of no use, and shows about forty-two thousand dollars (\$42,000) balance paid in on account of bonds of the Point Richmond Canal and Land Company, sold to H. C. Cutting since December 20, 1906.

On the former search for books, papers and records relating to the transactions between H. C. Cutting and the Point Richmond Canal and Land Company, and the Monetary Trust Company, I made a diligent search in all usual and ordinary places of deposit and custody for such papers and books, *and that* the above-mentioned contract and pass-books were not there and the same were not in such usual and ordinary places of deposit and custody, but were found by me since the trial of this action, as aforesaid, wholly by accident and by chance.

H. W. WERNSE.

Subscribed and sworn to before me this 11th day of October, A. D. 1915.

[Seal]

LOUISE BEARDEN,

Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within affidavit in support of petition for a rehearing and receipt of a copy is hereby acknowledged at San Francisco, California,

this day 13th of October, 1915.

WM. H. H. HART,
Solicitor for Defendants, Monetary Trust Company.
JNO. B. CLAYBERG and
CLAYBERG & WHITMORE,
Solicitors for Complainants. [87]

Notice of Lodgment of Statement.

To Henry J. Woodward and Francis A. Woodward,
complainants, and to Clayberg & Whitmore,
your solicitors, and to Monetary Trust Com-
pany, defendant, and to Wm. H. H. Hart, Esq.,
your solicitor:

YOU AND EACH OF YOU WILL HEREBY
PLEASE TAKE NOTICE: That the defendant
above-named Henry C. Cutting, by his solicitor,
Jacob M. Blake, has heretofore, and before the filing
of a praecipe for transcript on appeal, lodged, and
there is now lodged in the office of the clerk of the
above-entitled court, Second Division, thereof, in the
Postoffice Building, corner of Seventh and Mission
streets, in the city and county of San Francisco,
State of California, for your examination, a state-
ment in condensed form of all of the evidence essen-
tial to the decision of the questions to be presented
upon the appeal from the decree heretofore entered
in the above-entitled court and cause, on the 6th day
of October, 1915, as required by Rule 74 (b) of the
Rules of Practice for courts of equity of the United
States.

Dated December 2, 1915.

JACOB M. BLAKE,
Solicitor for Defendant Henry C. Cutting. [88]

Due service of the within notice of lodgment of statement and receipt of a copy thereof is hereby acknowledged.

San Francisco, California, this 4th day of December, 1915.

JNO B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for Appellees, Henry J. Woodward and Francis A. Woodward.

WM. H. H. HART, (R. L)

Solicitor for Appellee, Monetary Trust Company.

[89]

Notice of Time for Settling Objections to the Transcript on Appeal.

To Henry J. Woodward, and Francis A. Woodward, complainants above named, and to John B. Clayberg and Clayberg & Whitmore, your solicitors; and to the Monetary Trust Company, above-named defendant, and to William H. H. Hart, your solicitor: You and each of you hereby please take notice that the undersigned solicitor for the defendant, Henry C. Cutting, will on Saturday, the 18th day of December, 1915, at the hour of 9:30 o'clock A. M. of said day, appear in the above-entitled cause before the Honorable William C. Van Fleet, a Judge of the above-entitled court, at his chambers in the Postoffice Building at the corner of 7th and Mission Streets, in the city and county of San Francisco, State of California, and request said Judge to settle all objections to the general contents of the record and of the state-

ment of the evidence, prepared on appeal in the above-entitled cause.

Dated San Francisco, California, December 14th, 1915.

JACOB M. BLAKE,

Solicitor for the Defendant Henry C. Cutting.

Due service of the within notice of time for settling objections to the transcript on appeal, and a receipt of a copy thereof, is hereby admitted at San Francisco, Cal., this 14th day of December, 1915, and it is hereby stipulated that the within Notice and admission of service may be made a part of the transcript on appeal in the above-entitled suit.

JNO. B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for Complainants.

WM. H. H. HART,

Solicitor for the Monetary Trust Co. [90]

Statement of Evidence.

BE IT REMEMBERED, that the above-entitled suit came on for trial in the District Court of the United States, for the Northern District of California, Second Division, before the Honorable William C. Van Fleet, Judge thereof, on Wednesday, the 18th day of November, 1914, and said trial proceeded from day to day until Saturday, the 24th day of November, 1914, during which time testimony was introduced upon behalf of the respective parties, and that following is a complete, true and correct summary of all the testimony of the different witnesses reduced to narrative form, and true and correct cop-

ies of all the exhibits introduced, identified and marked as such during said trial, on behalf of the respective parties to said trial. [91*—1†]

[Proceedings Had November 18, 1914.]

Wednesday, November 18, 1914.

For the Plaintiffs, WELLES WHITMORE, Esq.

For the Defendants, W. H. H. HART, Esq.

Mr. HART.—I think this trial could be shortened very much by a statement being made and certain admissions made.

If your Honor please, the real property involved directly, you might say, in this case, consists of 406 acres of tide and marsh land in the city of Richmond. Mr. Fred Reichart, the gentleman mentioned in the pleadings, obtained a contract from the owners of the property, Mr. Mintzer and Mrs. Tuxberry—

It is a swamp land, tide land, inside the bight of the San Pablo Ranch now in the city of Richmond. Mr. Reichart arranged the proposition by saying that he would organize a corporation to take over the land and dredge it and improve it and fill it in. For that purpose he agreed to issue \$400,000 of bonds. \$336,000 of these bonds were to go to Mintzer and the Tuxberrys to pay for the title, no cash being paid; \$64,000 of the bonds were to be utilized so far as possible, for the purpose of reclaiming the land and putting it in a condition for sale and for occupation. Mr. Reichart then organized the Point Richmond Canal & Land Company and transferred that contract and the deeds were afterwards made to that

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Statement of Evidence as same appears in Certified Transcript of Record.

corporation and it issued the \$400,000 of bonds; \$336,000 was delivered to Mr. Mintzer and the \$64,000 remained in the treasury of the company. Mr. Reichart made arrangements with the Monetary Trust Company, which was incorporated by Mr. Mayo and a man by the name of Von Wagner, who came here to the city [92—2] as a promoter and proposed to enter into the business of floating Japanese loans during the Russian and Japanese war, and this Monetary Trust Company was organized and the plaintiffs in this case took, we believe, about 500 shares of that stock and paid in \$5,000. Then the company entered into a *quasi* contract—

The COURT.—You say the plaintiffs here took that?

Mr. HART.—I mean the defendants. The Monetary Trust Company entered into a *quasi* contract with the Point Richmond Canal & Land Company to take one-half of the stock of the corporation, that is, of the Point Richmond Canal & Land Company, and take the \$64,000 bonds and raise the money to go on with the work of reclaiming this land. Then Mr. Cutting came into the matter and bought, I think, \$11,000, or a fraction over—we will have to go to the testimony for the exact number of bonds—for \$10,000 in money. Mr. Reichart had entered into a secret arrangement with Mr. Mintzer that he was to have a part or about \$75,000 of the \$336,000 in bonds. This only comes incidentally into this case for the purpose of showing the value of the property as it was then looked upon; simply an incident. The Monetary Trust Company then had with the excep-

tion of the shares going to qualify the directors of the Point Richmond Canal & Land Company, one-half of the stock, and the other one-half belonged to Mr. Reichart. Now, later on, certain moneys were to be furnished by Mr. Reichart and he was to receive back one-quarter of the stock, so that there was—

The COURT.—From whom?

Mr. HART.—The Monetary Trust Company through Mr. Lewis, who was the manager of the Miller & Lux estate; but that fell through; but, nevertheless, Mr. Reichart got the stock. [93—3]

The COURT.—I don't understand now what company you are speaking of.

Mr. HART.—I am speaking of the Point Richmond Canal & Land Company. First Reichart had half of it.

The COURT.—He turned half over to the Monetary Trust Company?

Mr. HART.—He got one-half from the Monetary Trust Company in his arrangement with Mr. Lewis in order to raise the money to take the \$64,000 of bonds, but that fell through, but he got the stock all the same. Then Mr. Cutting came into the matter and then the property had to be improved and the question was whether the Monetary Trust Company would put up its share of the money to improve the property or whether it would be assessed; and we claim that the directors of the Monetary Trust Company had no money to put up, they would not put it up if they had it, as the land was considered of little value and already mortgaged for \$400,000, which had

to be paid before any profits could be obtained; so the directors determined to sell this stock at \$1.00 a share, at the same price that outside stock was selling at. Now, since that time that land has become valuable; it is probably worth \$500,000 over and above the bonds; the bonds have not been paid off, or they mature on the 1st of next January, in about six weeks. Now, it is assumed by these plaintiffs that because the property now is worth \$500,000 more than it was then, that that 1175 shares should come back into the Monetary Trust Company. In the meantime Mr. Cutting has gone to work and spent upwards of \$150,000 on the property, improving the same, and on account of the protection of the inner harbor of Richmond, which is alongside a part of this land, it has become valuable.

The COURT.—How did he ever get title to this eleven hundred and some odd shares? [94—4]

Mr. HART.—It was transferred to him for \$1,175. He paid for it by his check and this check was cashed through the bank. The company got the check and got the money. We admit he afterwards borrowed the money from the Monetary Trust Company. It does not look fishy to me, because in the first place the company had the money to loan and he was willing to pay the interest that they had charged for the loan. That is the situation. If your Honor should say under the law that he is not entitled to it, he is not; but that is a question of proof. We claim that the money that he paid for it was all it was worth at the time. That is really the main question in the whole case,—that is about all there is to this case.

If your Honor holds it was worth a great deal more money and we did not pay a reasonable value for it, and that the ratification of the stockholders was not sufficient, then the stock has got to go back. But, on the other hand, if it was not, we claim that plaintiffs should be nonsuited,—that is, recover nothing.
[95—5]

AFTERNOON SESSION.

Mr. HART.—If your Honor please, in this statement, I do not think it is very clear on one point. Has your Honor a copy of it?

The COURT.—No.

Mr. HART.—I stated this: “The plaintiffs in this case took, I believe, about 500 shares of that stock and paid in \$5,000. Then the company entered into a *quasi* contract”—

“The COURT.—You say the plaintiffs here took that stock?

Mr. HART.—I mean the defendants.”

Now, I think that the testimony ought to be gone into a little bit to show how many shares the plaintiffs took and how many the defendants took. I I don't know myself. Plaintiffs claim to have bought some stock. If your Honor would allow us to explain a little bit about that, it will have to come through the testimony, because I don't remember how that was. It may be that the plaintiffs took 500 shares and the defendants, too. I am not sure on that subject, but that we will have explained in the testimony. With that exception, I believe this statement is practically correct. If I see any other point, I shall call it to your Honor's attention.

Mr. WHITMORE.—If your Honor please, the statement made by General Hart seems to have eliminated quite a number of questions that we would probably have gone into. I wish them to produce that check the first thing. Have you the books of the company there? [96—6]

They will be here in two or three minutes. In fact, I think they are coming now.

[Testimony of Albert Betz, for Plaintiffs.]

ALBERT BETZ, called for the plaintiffs, and sworn, testified as follows:

I am secretary of the Monetary Trust Company and have all the books of the company with me; I have the minute-book, the book of the By-laws, the stock certificate book, the transfer journal, and the stock-book. These books have all been through the fire and, as a consequence, they are in this shape.

Thereupon, the following proceedings were had:

Mr. WHITMORE.—If your Honor please, I would offer all these books in evidence, with the understanding that we can read such portions of them into the evidence as we may desire.

The COURT.—Just put in the book and then you can read such parts into the record as you desire.

Mr. WHITMORE.—Q. Have you also the other books of the company showing the business transactions of the company?

A. These are the only books that I have.

Q. Do you know whether there are, or have you ever had in your possession, any books showing the business transacted by the company?

(Testimony of Albert Betz.)

A. Not further than what we have here, that I know of.

Q. Do you know of any other books?

A. I know of no others.

Q. Showing the transactions of the company?

A. No, I don't know of any others.

The COURT.—Q. Where did you keep a record of the business transactions of the company?

A. We have always kept them in the office of the company. [97—7]

The COURT.—Q. Where did you keep them, in what books?

A. These are the only books I have ever had.

The WITNESS.—The cashier may have done business of which I know nothing.

On cross-examination, the witness testified as follows:

I reside at present in Napa, where I have lived about three years. I have simply acted as secretary of the corporation, attending the meetings and keeping the minutes of the meetings. As to the financial transactions and business of the company, other than as stated, I had nothing to do.

Mr. HART.—Do you want to ask him any questions, Mr. Whitmore, about whether he was present at any particular meeting? You claim he was not. That is up to you, it seems to me, to go into that, if you want to at this time. It would be the chronological way in these proceedings.

The WITNESS.—The minutes will show the meetings I was not [98—8] present at. I pre-

(Testimony of Albert Betz.)

pared these minutes to be entered in the books. They were entered at or about the time they occurred, and as far as I know, the minutes are correct. The record shows that the minutes were approved wherever they have been approved. I have been a secretary of corporations for quite a number of years, at different times, and I understand the keeping of minutes of meetings and the by-laws and so forth. To the best of my knowledge these minutes are correct as stated in the books. As far as I know, there were no other minutes other than these on the books that were not entered. There were several meetings that I did not attend; I could not tell just how many. [99—8¾] The minutes of the meetings that I did not attend were written up by a secretary *pro tem* appointed at the time. So far as I know all of the minutes of all of the meetings at which I was not present were afterwards written up and are in the books. A good many of the minutes are typewritten; I did quite a number of the typewritten ones. I don't know as I would know my own typewriting, if I saw it. The minutes extend over a period of ten or twelve years.

Mr. WHITMORE.—I will call your Honor's attention to the minutes of December 20, 1906, which are typewritten and pasted in on page 33 of the minute-book. I will read them in evidence. This is one that we will offer in evidence, anyway, your Honor. "Meeting of the directors of the Monetary Trust Company held this 20th day of December, 1906, at 12 o'clock noon.

(Testimony of Albert Betz.)

Present: H. C. Cutting, W. J. Morgan, H. W. Werne.

Absent: Albert Betz, H. B. Mayo.

On motion of H. W. Wernse and seconded by W. J. Morgan, and carried unanimously, H. C. Cutting was elected President. W. J. Morgan, Vice-president. Albert Betz, Secretary. H. W. Wernse, Cashier and Trust Officer.

Mr. H. W. Wernse presented the check of H. C. Cutting for \$1175, stating that Mr. Cutting desired to exercise his right under the option given him by the Monetary Trust Company, ratified and confirmed by the stockholders at their last meeting, to purchase 1175 shares of Point Richmond Canal and Land Co. stock held by the Monetary Trust Company at \$1.00 per share.

On motion of W. J. Morgan (under the advice of the Chief Counsel) and carried unanimously, the cashier was ordered to deliver to H. C. Cutting the certificate for 1175 shares of Point Richmond Canal & Land Company stock for \$1,175, as per [100—9] the option.

There being no further business, the meeting adjourned. Albert Betz, Secretary."

The WITNESS.—That was written by someone else for me. I was not present.

The COURT.—Q. How did you come to sign it as secretary, if you were not present?

A. I think you will find at the next meeting the minutes were approved. That is how I came to sign it.

(Testimony of Albert Betz.)

Mr. WHITMORE.—Q. I wish you would turn back and procure the minutes showing the authorization, the option and the ratification mentioned in these minutes of that date.

A. That is at the meeting of the stockholders held on November 10, 1906. I was present at that meeting.

The COURT.—Read the entire minutes of that meeting in evidence and let us see what they are.

A. (Reading): “Stockholders’ meeting of the Monetary Trust Company, held November 10, 1906, at 10 A. M., pursuant to adjournment. Thirteen hundred seventy-eight (1378) shares, a majority of [101—10] the stock issued, being represented. Mr. Wernse nominated as directors Messrs. Cutting, Morgan, Wernse, Mayo and Betz. There being no further nominations the nominations were closed, and the secretary was instructed to cast the ballot for said persons as directors, and said persons were declared directors of this company for the following year or until their successors were elected. Mr. Wernse of the executive committee being the only member of said committee present, offered for ratification and approval, the following option given to H. C. Cutting; and upon motion of Mr. Wernse, seconded by Mr. Betz, approved by the following vote: H. W. Wernse, representing 505 shares;

W. J. Morgan,	“	65	“
Albert Betz	“	55	“

H. C. Cutting (H. W. Wernse proxy)

753 “

Being more than a majority of the shares issued.

(Testimony of Albert Betz.)

On motion of H. W. Wernse and seconded by Albert Betz, all actions of the board of directors and its officers since the last stockholders meeting, to date hereof, were unanimously ratified, approved and confirmed.

There being no further business, the stockholders meeting on motion duly made and seconded was adjourned. Albert Betz, Secretary."

The COURT.—Q. Where is that option that is referred to there?

A. That option, I don't know where that is now. That option was always in this book, but where it is at the present time, I am unable to say. [102—11]

Mr. WHITMORE.—Can you find in the previous records any reference to that option?

A. There is nothing further that I know of in regard to that.

Mr. WHITMORE.—Q. Now the meeting that you read, what is the date of this one here?

A. This one is November 10, 1906.

Q. You mean of the stockholders?

A. The stockholders, November 10, 1906.

Q. That appears on page 31 of the minute-book?

A. Page 32.

Q. Turn back to the meeting from which that was adjourned. It appears to have been adjourned meeting.

A. Well, this appears to be the meeting that was adjourned, held September 3, 1906.

Mr. WHITMORE.—Q. Just read the minutes of the meeting of September 3, 1906, as it appears at

(Testimony of Albert Betz.)

page 31 of the minute-book. [103—111½]

A. (Reading:) “Meeting of The Monetary Trust Company, held September 3d, 1906. Present, H. C. Cutting, W. B. Mayo, W. J. Morgan, Albert Betz.

Absent: F. W. Woodward.

It was moved by W. J. Morgan and seconded by Albert Betz, that room No. 404, 925 Golden Gate Avenue, be made the office of the Monetary Trust Company until the further order of the board of directors. Unanimously carried.

On motion of Albert Betz and seconded by W. J. Morgan, it was unanimously resolved, that:

Whereas the annual meeting of the Monetary Trust Company not having been held, therefore said Annual meeting is called for Saturday, September 29, 1906, at 12 M., at the office of said company, room 404, 925 Golden Gate Avenue, for the purpose of electing a board of directors, and taking into consideration whether or not the assets of the company be disposed of, what step shall be taken for the purpose of raising funds for carrying out the work in Richmond; and such other business as may properly come before the board, and that the secretary make the necessary publication.

It was moved, seconded and carried, that the secretary procure a seal in the words of the seal destroyed, and certain books and stationery as may be needed by the company.

(Testimony of Albert Betz.)

There being no further business, the meeting adjourned.

ALBERT BETZ,
Secretary."

This is a directors' meeting.

The COURT.—You see the meeting they directed the secretary to call on that one of September 3d, is for the 29th of September. Is there no evidence of such a meeting?

A. Evidently the meeting did not take place and was adjourned. There is nothing there. [104—12]

The COURT.—Q. Whether a meeting took place or not, if a meeting has been called, there must be some minutes with reference to it because a minority can postpone a meeting but a quorum only can transact business.

The WITNESS.—Evidently there was no quorum present, and it went over.

The COURT.—That is a mere deduction of yours. That is not evidence.

WITNESS.—(Continuing.) I know nothing about this check of \$1,178.00 from Mr. Cutting. I never saw it to my knowledge.

[Testimony of H. C. Cutting, for Plaintiffs.]

H. C. CUTTING, called for the plaintiffs, and duly sworn, testified as follows:

Mr. WHITMORE.—Q. Mr. Cutting, have you that check with you for \$1,175 that was issued on the 20th of December, 1906, to the Monetary Trust Company?

A. No; when Mr. Mayo served me with that paper,

(Testimony of H. C. Cutting.)

I looked to see if I could find it, and I could not find any checks that were issued before I moved down into the Monadnock Building—

Q. You have not that check with you and cannot produce it?

A. No, I could not find it. [105—13]

[Testimony of H. W. Wernse, for Plaintiffs.]

H. W. WERNSE, called for plaintiffs, and duly sworn, testified as follows:

I am cashier and trust officer of the Monetary Trust Company. I have acted in that capacity since right after the organization, which was sometime before the earthquake and fire. Before the fire we had a stenographer that kept the books, but at my direction. Since that time the entries have been made by myself. Those books are down at 779 Monadnock Building. I can go down and get them right away.

(Thereupon the witness went and secured the books.)

(The witness identified the cash-book and journal of the Monetary Trust Company, whereupon the following proceedings were had:

Mr. WHITMORE.—I will offer them both in evidence, with the understanding we can read from any place we see fit in them; it may be all considered read, for that matter.

Mr. HART.—Yes.

Mr. WHITMORE.—Q. I hand you the cash-book and I wish you [106—14] would turn to the cash-

(Testimony of H. W. Wernse.)

book and show the payment by Mr. H. C. Cutting of \$1,175 for 1175 shares of the Monetary Trust Company stock, or the Point Richmond Canal & Land Company stock.

A. On page 54. (Reading:) "To H. C. Cutting account, 1175 shares Point Richmond Canal & Land Company stock \$1,175." The date is February 28, 1907. It does not show in here how it was paid; that is merely an entry in the book.

I received from Mr. Cutting a check for \$1,175 on the 20th of December, 1906, the date of the meeting of the company in which it is written in the minutes that I presented a check and stated that he desired to exercise his option to purchase the 1175 shares of stock. In the ordinary course of business. I would deposit it—I don't remember at this time what I did with it; it is a long time ago. I have not the bank book here.

A. The bank-book has been out of my possession for some time. I have been looking for it and I could not find it. I don't know whose possession it has been in. I did not cash that check myself. It would not be cashed—made out to the Monetary Trust Company, it would not be cashed; I do not believe any bank would cash it. They would take it for deposit.

A. It was not cashed—I did not cash it.

The COURT.—Q. What did you do with it? How did it get out of your possession? What did you do with it? Do you know what became of it? [107—15]

(Testimony of H. W. Wernse.)

A. I don't remember what was done unless it was deposited; that is what should have been done with it.

Q. That would be virtually cashing it, so far as the company would be concerned; they would get credit at the bank for it.

A. Yes, they would get credit for it.

Q. Where does that appear?

A. The only entry appears right here.

Q. That is a different thing. You very evidently entered that check as cash, didn't you? A. Yes.

Q. But you did not cash the check?

A. Money received—what we call “money received” and “cash disbursed.” That is the way we kept the books.

Q. And checks are entered in that respect as cash, I suppose? A. Yes.

Mr. WHITMORE,—Q. This check, the minutes of the company show was received on the 20th day of December, 1906. Now, what did you do with it at that time, do you remember?

A. I don't remember; I simply presented it at the meeting as the minutes show.

The COURT.—Q. What is the date of the entry here?

A. Of February 28, 1907.

The COURT.—Q. Where would that be all that time, that item?

A. I don't remember why that item was put in there in February instead of in December.

I have not in my possession, among the books and

(Testimony of H. W. Wernse.)

papers of the company, the note of H. C. Cutting for \$1,175.

The books show that the note was paid and a new note issued. I took that note June 1, 1907; I took the first note June 1, 1907. That note is for \$1,175. On August 27th there was a payment of \$125 on account of the note and \$16.90 account of the note for the purpose of meeting our license tax of \$100 and advertisements of notice in the Daily Journal of Commerce. [108—16]

I have been during all this time associated with Mr. Cutting in or around the office. The Monetary Trust Company since April 18, 1906, took a trusteeship on some bonds from O. A. Ellis which was called the Independent Nevada Milling Syndicate. That was only fees paid in, which were \$50.00. There were expenses that were paid.

The COURT.—Q. Where are the papers representing that trust?

A. Those papers are down in the safe. I did not bring those papers up. I will bring the whole thing. That was in 1908, and the papers were put back with a lot of old files. The trust was cancelled.

The WITNESS.—(Continuing.) My account shows that Mr. Cutting has paid in on account of purchase of the stock of the Monetary Trust Company, \$1,175.

The COURT.—Q. What money has been paid in by Mr. Cutting for issue to him of the defendant company stock, the Monetary Trust Company, he is asking you?

(Testimony of H. W. Wernse.)

A. The only way we can find that out is by taking and drawing this off from the ledger. After the fire, we never resurrected the ledger, these books were the only books saved. That is the cash-book we had before the fire, but you have to go down here and take each entry where he paid it.

Mr. WHITMORE.—Q. Can you point to any entry where he paid anything. [109—17]

A. Yes, right here, \$300 on September 15th.

Q. For what?

A. September 15, 1904, stock subscription.

Q. Did he pay that money? A. Yes.

Q. Have you got a record in your bank account of bank-book of the payment of that money?

A. That was in the Germania National Bank in 1904 and destroyed. My bank-book was destroyed at the same time, in the Crossley Building. These records show they were made before the fire.

Q. Is there any other item of payment that you can find? A. On September 26, 1904, \$239.

Q. When these amounts were paid, what was done with them? Were they deposited in the bank?

A. They were deposited in the Germania National Bank.

Q. What was his subscription to stock originally?

A. I believe if you will let me have that book I can tell you from that—500 shares.

Q. \$5,000? A. \$5,000. [110—17½]

The COURT.—Q. Is that all he paid in?

A. No, I can read them. “November 30, 1904,

(Testimony of H. W. Wernse.)

\$175. March 27, 1905, \$150. April 22, 1905, \$50 and \$40. May 2, 1905, \$405, \$40, \$75, and \$2.25. June 7, 1905, \$265, June 16, \$5, and \$20. July 1, 1905, \$258.50. August 8, 1905, \$262.85. August 31, \$10.

The books don't mention what these are paid on account of.

The COURT.—Read these various entries and see what they show. You have been stating them as though they have been on account of the stock.

A. They are paid in on account of stock.

Q. You say it don't say that?

A. It does not in the cash-book; all the entries were carried out in that manner.

Q. How would it be he would be paying in \$40 and \$7 in separate payments on the same day, and then make payments in odd amounts like that \$262.85?

A. We used to have the bills and we would at the end of the month figure up what the bills were and Mr. Cutting would give us his check for the amount of the bills.

Q. Was Mr. Cutting running the whole thing?

A. His subscription of stock was there and we called on him for his payments.

Q. You had other subscriptions for stock, too, didn't you?

A. Mr. Mayo. He paid for his in the same way.

Q. Is that a usual way to receive payments for subscriptions of stock; just to take the amount the expenses call for?

A. The argument advanced at that time was, when there was anything to invest it in they would put up

(Testimony of H. W. Wernse.)

the balance of the money. [111—18]

Mr. WHITMORE.—Q. I want these items paid for the expenses of the office, these in 1905 that you have just been reading; take for instance the item of June 7, 1905.

Q. Of \$265?

Q. Yes.

A. The charge against that is Hartland Law, rent, \$135.

Q. It was rent of the office that was occupied by Mr. Cutting and in with the company had nominal offices, was it not?

A. Occupied by the Monetary Trust Company.

Q. How much of it was paid to you as secretary out of that payment?

A. The Monetary Trust Company rented these offices upstairs in the Crossley Building from Mr. Hartland Law.

The COURT.—Q. He asked you how much of that particular payment was paid to you as secretary.

A. I did not receive this payment as secretary.

Mr. WHITMORE.—Q. As the Cashier?

A. \$135 was the check drawn by me on the Germania National Bank for \$7.15 in favor of the Pacific States Telephone & Telegraph Company.

Q. That was for telephone service?

A. Yes. A check was drawn for \$40 in favor of M. C. Boyd, stenographer and bookkeeper.

Q. A stenographer in Mr. Cutting's office?

A. No, a stenographer in the Monetary Trust Company.

(Testimony of H. W. Wernse.)

Q. What business was the Monetary Trust Company doing in the month of June, 1905? Just show any business they transacted that month.

A. Well, the Monetary Trust Company was attempting to transact a lot of business at that time and at other times. One piece of business that I was trying to transact as cashier and trust officer was the purchase of two blocks of land in [112—19] the Richmond District for \$8,000 cash and some stock in the trust company.

Q. Anything in the minutes of that company employing you or authorizing the purchase of any such land?

A. Not in the minutes, but the directors of the company authorized me to try to get business.

Q. Where is that record?

A. I do not believe you will find it in the records, but I guess the directors all will admit that.

I received \$75 as cashier out of the payment of that \$265 and \$5 and \$20 by Mr. Cutting and Miss Boyd received \$40 as a stenographer, and the rent, \$135.

Q. And all this time this was Mr. Cutting's office as well as the Monetary Trust Company's office, was it not?

A. He did very little business that I could ever see.

Q. Mr. Wernse, you didn't answer the question.

A. He had a desk there, yes.

Q. It was his office?

A. He made it his office all that time. [113—
[191½] I could not tell you whether the stenographer did any work for him. I suppose if he wanted to dic-

(Testimony of H. W. Wernse.)

tate a letter, she would take it. The stenographer wrote letters for the Monetary Trust Company. I have none of those letters or copies of them. They were in the Crossley Building and they were burned in the fire. These books were in the safe and they were pretty compact and they held; the minute-books were charred worse.

Before the fire, Mr. Morgan had offices with Mr. Cutting. Mr. Morgan paid half of the rent and whatever his telephone bill was. The rent increased as we went along. I see here on December, 1905, we paid \$160 a month, and Mr. Morgan paid at that time, \$88.60.

The COURT.—Q. Then Mr. Morgan really paid one-half of this item of \$135?

A. Not at that time; after he came in in July, 1905; he paid \$91.75 in July.

The COURT.—Q. That would be more than half?

A. I suppose he came in in June, because that was July, and I suppose we paid the rent for June.

Q It is not a matter of supposition. Your books ought to show what the figures are.

A. It shows only we received the cash, but it does not show definitely what was done with the \$91.75.

Q. Don't your books show what your monthly transactions were so that you can show exactly to a dollar or a cent what it went for, what it was received for? A. Yes.

Q. Isn't that the purpose of the books?

(Testimony of H. W. Wernse.)

A. Yes, but when we take in \$91.75 from Mr. Morgan, we didn't put down what it was taken for. It was half the expense.

Q. Then, how do you know what it was taken for, if the books do not show the transactions? Do you carry them in your head?

A. Not transactions in money, but we carry the transactions of why a man was in the office, occupying an office.

Mr. HART.—Q. In other words, that entry includes what he [114—20] owed up to that time for rent? A. Yes.

The COURT.—How do you know that includes what he owed? Perhaps that was only part of it, of what he owed. How can you tell from your books if that is the way they were kept?

A. Well, I have to confess, your Honor, that I am not a bookkeeper; I kept the cash, what I received and what I expended. These were all the books that were kept.

Q. Then really there was no way of telling from those books the amount that was really expended by the Monetary Trust Company, for the maintenance of offices and their incidentals, and what was bought from other sources?

A. Yes, they all show that here. The books show.

Q. You just stated you could not tell whether he owed more than \$91.75 or not?

A. I did not mean to say so. I meant to say that we collected from Mr. Morgan \$91.75; that was his

(Testimony of H. W. Wernse.)

half of what he should pay during the month.

The COURT.—Q. Where do your books show that the other half was or what the other expenditure was, or what the total was, to see whether it was half or not?

A. It shows here we paid out on July 3d to Hartland Law on account of rent \$135. Star Supply Company, \$1.50; Pacific States Telephone & Telegraph Company, \$7.83. To H. C. Cutting, \$91.75; \$91.75 was paid by Mr. Morgan, and \$91.75 by Mr. Cutting; Mr. Cutting gave his check for the total amount and we returned Mr. Cutting his \$91.75.

Q. Why?

A. Because that was one-half of the expenses. I see two items right here. Mr. Cutting paid \$258.50, and we returned to him \$91.75.

Q. Under your method of keeping books, why should he have paid in anything more than his half of the expenditures?

A. Mr. Morgan, I suppose, was not there at the time, and Mr. Cutting gave his check to pay these bills.

We have got Mr. Morgan credited up with \$91.75, Mr. Cutting with \$258.50, and the rent, \$135, and Miss Boyd, \$40; [115—21] and myself, \$75, and Mr. Cutting \$91.75.

Q. "Then you have a charge of having paid Cutting \$91.75." A. "Yes, that was it."

The COURT.—Q. Now, why, if Mr. Cutting was at that time owing, as your books indicate, a large

(Testimony of H. W. Wernse.)

amount still on his subscription for stock, was any money returned to him?

A. There was an agreement about how the expenses were to be carried on of that office, between the directors and myself, how I should do it.

Q. Where is there anything in your minutes that shows any such arrangement as that?

A. Nothing in the minutes that I can see to show it.

Q. Would not that indicate that this arrangement as to the offices was really a private transaction between Mr. Cutting and Mr. Morgan?

A. I would not say so, no. Mr. Morgan had the sanction of the rest of the directors to come in there and pay a part of the expenses. We expected at any time to do this business that General Hart spoke of.

Q. You are aware, aren't you, that the evidence of a sanction or other transaction of a board of directors should find a place in the minutes of their proceedings?

A. Lately I have, your Honor, but at this time I was not aware of that.

Mr. HART.—Q. When you say "this time" you mean the date of these entries?

A. I mean at this time, 1905.

Mr. WHITMORE.—Q. Now, take August, how much did Mr. Cutting—how much have you credited him with paying? A. \$262.85.

Q. And how much Mr. Morgan? A. \$91.40.

(Testimony of H. W. Wernse.)

Q. What payments were paid out during that month?

A. M. C. Boyd, stenographer, \$40; Hartland Law, on account of rent, \$135; Pacific States Telephone & Telegraph Company, [116—22] \$7.85; H. W. Wernse, \$75; Milton Heyneman, office supplies, \$2.05; Le Count Brothers, \$1.50; H. C. Cutting, \$91.40; Mercantile Guide Directory, \$3.25; postage, 50 cents; Herring, Hall Safe Company, \$1.50.

Those were all office expenses, including supplies and rent. At that time, in August, 1905, Mr. Morgan had part of the office and Mr. Cutting had an office in the rear, with the understanding he was to pay half of the rent of the office and telephone and incidental expenses,—towels, supplies.

The records do not show any business transacted by the Monetary Trust Company in the month of August.

In the month of September, Mr. Cutting paid \$260 and Mr. Morgan \$92.75. Those items were paid to cover Hartland Law, on account of rent, \$135; M. C. Boyd, \$40; Pacific States Telephone & Telegraph Company, \$9; H. W. Wernse, \$75; Star Towel Supply Company, \$1.50; Moise-Klinkner Company, 75 cents; H. C. Cutting, \$92.75. That was for the half that Mr. Morgan paid on account of the expenses.

Q. Well, then, if Mr. Morgan paid in \$92.75 and you paid that amount, \$92.75, back to Mr. Cutting, he got all that Mr. Morgan paid in, didn't he?

A. It was returned to him. The entry could have

(Testimony of H. W. Wernse.)

been changed. The entry could have read just the actual amount that we should have credited Mr. Cutting, but instead of that we got his check for \$260, and returned him the \$92.75 when Mr. Morgan paid it in.

Q. But you have credited Mr. Morgan with paying \$92.75, so the receipt that you had was \$260 and \$92.75 for the month of September, 1905, and then you paid back the amount that Mr. Morgan paid to the company to Mr. Cutting, did you not? [117—23]

A. Returned it to Mr. Cutting; Mr. Cutting advanced it. We charged Mr. Cutting with having received it.

Q. Where do you charge him with receiving it?

A. H. C. Cutting, \$92.75.

The COURT.—Q. That isn't half of \$260?

A. No, it is not. It is half of the expenses which he was to pay.

Q. He did not pay half of all the expenses?

A. Not all, no. He was to pay nothing to be paid to me. I was paid by the Monetary Trust Company \$75. He was to pay half the rent and the 'phone bill—usually on the bill it showed what the long distance was.

I did nothing for Mr. Morgan. At that time I was not doing any business for Mr. Cutting. At that time Mr. Cutting was mostly in Tonopah, between Tonopah and San Francisco—engaged in mining there, and he was very seldom here.

The WITNESS.—(Continuing.) I have no item

(Testimony of H. W. Wernse.)

for December, 1906, and nothing for the November previous. I have for October previous, 1906, "Received of Pacific Underwriting & Trust Company, \$6.50 and \$4.50." \$6.50 was paid out to the "Daily Journal of Commerce" for notice of annual stockholders' meeting, and the \$4.50 was paid out to Damiah & Steckler, stationery, for letter-heads for the Monetary Trust Company. For September, I have, "Received from H. C. Cutting \$75. Paid to H. W. Wernse \$75." Didn't charge any rent in these months. After the fire we were up on Golden Gate Avenue.

In August of 1906. I have the entry, "Received from Pacific Underwriting & Trust Company, \$20; from H. C. Cutting, \$75;" and paid out to C. F. Curry, on license tax, \$20; H. W. Wernse, \$75.

In July, "Received from H. C. Cutting \$75; paid out to H. W. Wernse \$75." That was for me as cashier. [118—24]

The books do not show any business from July to December, inclusive. I know only myself what I did. I did not put it down in the book. I have no books that show.

The books do not show any business transacted the first half of the year, from January to June, inclusive.

Mr. WHITMORE.—Q. Now, turn to the books that show the transactions of a trust that the company holds of \$1093, I think it is.

A. That was January 20, 1908. The item shown by our books is "To cash balance, Pacific Under-

(Testimony of H. W. Wernse.)

writing & Trust Company, Brauer settlement, \$1,093." The books show that the company holds that money in trust for the Pacific Underwriting & Trust Company. We have it loaned out, to H. C. Cutting on his note at 8 per cent. The company now holds one note of H. C. Cutting for \$1,000 and one note for \$1,093.

The COURT.—When did you say that the loan of this \$1,175 was made to Cutting and they received the note?

Mr. WHITMORE.—They received the check as shown by the minutes on the 20th of December, 1906.

The COURT.—When was the loan of that amount to Cutting?

The WITNESS.—June 1, 1907.

Mr. WHITMORE.—The entry of the receipt of the money is February 28, 1907? A. Yes.

Q. Do your books show what has become of that trust fund now more than a loan—does it show that that is loaned, and if so where?

A. Yes, it says, "By loan to H. C. Cutting, note 8 per cent, \$1,093."

Q. That does not refer to the trust fund; it is only the same amount; is that it?

A. It is the same amount and the same date.

Immediately on getting that \$1,593 it was loaned to Cutting. [119—25]

The WITNESS.—(Continuing.) In September, 1904, we received \$539 from Mr. Cutting on his subscription. With that we paid the rent, Miss Boyd, postage, telegrams; office supplies and advertise-

(Testimony of H. W. Wernse.)

ments and Point Richmond Canal & Land Company, on account of surveyor, surveying the land at Richmond. That is the Point Richmond Canal & Land Company's land. The Monetary Trust Company paid some of the expenses.

The way they came to be paying expenses on the land of another corporation was that the Canal Company had no money and the surveyor surveyed the land at the instance of the Company, the Canal Company. I suppose it was part of their business to pay the expense of the Canal Company.

If your Honor please, the board would meet—Mr. Mayo would come down in the Crossley Building; General Hart would come down from the Parrott Building; Mr. Morgan was there and myself,—and present a bill and say, “The surveyor wants his money; better pay it; draw a check and pay it.” Mr. Betz, who was up in the Parrott Building,—the secretary,—did not come down, and we did not have a regular meeting; and I was authorized to draw a check and pay it. I don't know how I can show it any other way than how the money went. I do not know of any minutes of the Monetary Trust Company, either stockholders or directors that this one bill should be paid. I do not believe the minutes ever provided for us paying bills. The item that I have read that I said was a cash payment by Mr. Cutting, was really applied to the payment of the expenses of the corporation. It went to pay all these expenses and then we got a big desk there from

(Testimony of H. W. Wernse.)

Fuller for the office.

The COURT.—The question he asked was whether there are any entries in your books showing the payment of anything on account of his subscription to stock, other than payments made to meet office expenses. [120—26]

A. Well, we had on the 15th day of December, received a check for \$300 and on the 17th of December, we had only paid out \$125 on account of rent, \$40 to Miss Boyd, postage, \$1.00, telegrams, \$1.00, postage, 50 cents, exchange, 15 cents, \$48 to New York exchange, to McCormick. They are all the items paid out up to that time.

It looks like I missed my own salary that month. I got it later. I do not believe I missed putting it down.

No, there is no entry in the books showing an authorization through the board of directors to make any loans to Mr. Cutting, either of this \$1,175 or the trust fund of \$1,093. Our books do not show any transaction, any business by the Monetary Trust Company during the year 1907. In 1908 they show this one transaction; that is all,—the Brauer transaction. Since that time, in June, 1909, the books of the Monetary Trust Company show we received from the Independent Milling Syndicate \$50.00. That was paid to myself. The real transaction was, we received the money from the Independent Nevada Milling Syndicate, as a fee to act as trustee on some bonds that had been issued; that was not myself individually; it was the Trust Company; it was not paid to

(Testimony of H. W. Wernse.)

me individually; it was paid to the Monetary Trust Company, it was paid out to me as salary. It was not much to grab onto, your Honor, for a month's work.

(An adjournment was here taken until to-morrow, Thursday, November 19th, 1914, at 10 A. M.)
[121—27—28]

Thursday, November 19th, 1914.

H. W. WERNSE, direct examination (resumed).

Mr. WHITMORE.—Mr. Wernse, have you got the notes given by Mr. Cutting, the defendant, to the Monetary Trust Company?

A. Yes, I have them there.

I have not the note for \$1,175; part was paid off and this was a new note given; the book shows it. The new note was given for \$1,000, the balance. The books show that \$175 and interest was paid. This is the new note. The other note was surrendered at the time. This is the note given for the balance then claimed to be due upon that original note for \$1,000. There has not been any renewal of this note or any note given in place of it.

Mr. WHITMORE.—I would like to offer this in evidence, if your Honor please. This is dated August 27, 1907. I will read it. (Reading:)

“San Francisco, August 27, 1907.

“\$1,000.

One year after date without grace I promise to pay the Monetary Trust Company or order the sum of one thousand dollars, payable only in gold coin of the Government of the United States, for value received, with interest thereon in like gold coin, at the

(Testimony of H. W. Wernse.)

rate of 8 per cent per year from date until paid.

H. C. CUTTING.”

The COURT.—Q. If that note has been paid how does it come to be in your possession?

A. That note was never paid. The \$1,175 note was paid by paying off \$175 of the principal. [122—29]

Q. That doesn't pay a note. You mean that there was that much paid on it and a new note made. Has this never been paid?

A. This has never been paid.

The WITNESS.—We have collected interest on it.

Mr. WHITMORE.—I will also read this one—(addressing the witness): This note you hand me, dated January 21, 1908, signed “H. C. Cutting, for \$1,093, is the other note referred to?

A. Yes. That is for the amount of money the company holds a trust for. [123—30]

The COURT.—Q. Were both these notes signed by Mr. Cutting personally or by somebody in his behalf? A. H. C. Cutting personally.

Mr. WHITMORE.—I will read this:

“ San Francisco, January 21, 1908.
\$1,093.

One year after date without grace I promise to pay to the order of Monetary Trust Co., \$1,093 for value received with interest at 8 per cent per year from date until paid, both principal and interest payable only in United States gold coin.

H. C. CUTTING.”

What is that down in the corner?

(Testimony of H. W. Wernse.)

A. That is just a note which I made there, on account of Pacific Underwriting & Trust Company trust—that is by own notation.

Mr. WHITMORE.—I will read that also: “Account Pac. Und. & T. Co.”

The COURT.—What is the date of that note?

Mr. WHITMORE.—It is dated January 21, 1908, payable one year after date.

The COURT.—No endorsements on it?

Mr. WHITMORE.—No endorsements whatever.

The COURT.—Q. Any interest been paid on that?

A. Yes, \$150.

Q. Does that cover the entire interest?

A. No, it does not.

Q. How much?

A. The balance due up to April 20th of this year was \$307.51.

Q. That remains unpaid?

A. That remains unpaid.

The COURT.—The note is outlawed. Any endorsements on the other notes?

Mr. WHITMORE.—Not on either of them.
[124—31]

The COURT.—Don't you endorse payments of interest on a note?

A. I do it in the bank. It is not endorsed on the note.

Q. It is not endorsed on the note?

A. No, I have a memorandum on the note.

The WITNESS.—(Continuing.) Since the fire and earthquake, in 1906, The Monetary Trust Com-

(Testimony of H. W. Wernse.)

pany had a bank account; they opened a bank account sometime after the fire. I have the bank-books of the Central Trust Company with me. The account was opened on August 29, 1907. Before that, between April 18, 1906, and August, 1907, the Germania National Bank was the only one we had an account with. That bank-book was destroyed in the fire. Between the fire and August, 1907, the Germania National Bank was the only one we had a balance in and that still remains here; these people took it over. This is the only bank account outside of the Germania, between the date of the fire and the 29th of August, 1907. During that period we had no active bank account. We simply had a balance left remaining in the Germania at the time of the fire of \$6.42. The only money paid in between the date of the fire and the opening of the bank account in August, 1907, was on account of my salary; a check was given to me and I credited it to the account of Mr. Cutting and took the money without passing it through the bank.

The \$1,175 that the books show Mr. Cutting paid on the 26th of February, 1907, was not deposited in this bank. I don't remember of it ever being paid.

Mr. WHITMORE.—Then in June, 1907, you took this first note that you say was cancelled by the giving of this note [125—32] you have produced now?

A. Whatever the date in that cash-book is, that was the date. And that was the amount represented by the check of Mr. Cutting, \$1,175. I had the check for it. I never personally had the proceeds of the check

(Testimony of H. W. Wernse.)

in my possession, but I had the check. I could not tell whether it was deposited or not. This is the only bank-book we have. This has been some time ago. The entries in there of February 28 and June 1st confuse me; I don't know why it was that length of time. They are my entries.

Mr. WHITMORE.—That is all with this matter. I don't desire the bank-book.

The WITNESS.—(Continuing.) 505 shares of stock in this company is standing in my name. I personally own 505 shares. There is one certificate issued to me as trustee. That is my own personally. I did not pay any money into the company for the stock. In the beginning of it there were certain options and trusts and stock turned over to the Monetary Trust Company in which I had an interest,—General Hart and myself, and for that The Monetary Trust Company issued this stock; that is how I got my stock.

I have here, I think, the whole transaction. I think the minute-books will show the transaction.

This letter written on General Hart's letter-paper, that was signed by General Hart has gone through the fire, and I don't know whether I can read it; it is the letter that offered to the company the assets that were turned over to the company at the time of the organization— [126—33]

Mr. WHITMORE.—Q. Does the letter state what the assets are?

A. I think the minute-book can be easier read than this. The date of the letter is March 26, 1904. I

(Testimony of H. W. Wernse.)

think you will find it right in the first minutes.

Mr. WHITMORE.—I find, your Honor, in the minute-book a reference to a proposition submitted by Mr. W. H. H. Hart, but it does not give the proposition nor the property.

The COURT.—You had better read them if you want them to go into evidence.

Mr. WHITMORE.—This is the minutes of the stockholders' meeting of The Monetary Trust Company called on the 26th of March, 1904. There were five shares each. "Stockholders' meeting, H. B. Mayo, 5 shares, W. J. Morgan, 5 shares, H. W. Wernse, 5 shares, Albert Betz, 5 shares, Dan Van Wagenen, 5 shares, represented by H. B. Mayo, proxy."

There were 25 shares issued at that time, apparently. This is the organization meeting, stockholders' meeting, at the time of the organization, and that appears to be the subscribed stock. This item evidently refers to that paper produced by the witness, which is as follows: "Mr. William H. H. Hart submitted in behalf of himself and associates a proposition in writing to turn over to this company certain options and contracts held by them in consideration of the issuance to H. W. Wernse as trustee of 2,000 shares of the capital stock of this company, and also to pay into the treasury of this company \$10,000 within one year, for and in consideration of the issuance of an additional 1,000 shares of said stock to H. W. Wernse, as trustee, as fast as the same are paid for at the rate of \$10 per share; and on motion of W. J. Morgan and second of

(Testimony of H. W. Wernse.)

H. W. Wernse, said proposition of said Hart and associates was unanimously accepted. There being no further business before the stockholders, on motion, the meeting adjourned. H. B. Mayo, President; Albert Betz, Secretary." [127—34]

Q. Is that the paper you have in your hand, Mr. Wernse, the paper that was submitted at this stockholders' meeting? A. Yes.

Q. Can you read that paper and determine what property was turned over? A. I think I can.

(It is offered and received in evidence without objection and is as follows):

"To the Monetary Trust Company and to the Stockholders and Board of Directors thereof:

Gentlemen: I hereby make you the following proposition and offer said company a certain option and contract I hold authorizing me to make a loan of 8,000,000 yen, Japanese money, or its equivalent, to the Japanese Government, together with all commissions and emoluments to arise thereunder and coming to me.

2d. I also offer to assign, sell and transfer to your said company all commissions on and to arise out of that certain contract now under consideration with George W. Brown, M. E., the California Gold Recovery Company, a corporation, and the owners of the Canon Placer Mining claims on the Hassayampa River, and tributaries, in the County of Yavapai, Territory of Arizona.

3d. I also offer to turn over or cause to be turned over to your company certain business in the In-

(Testimony of H. W. Wernse.)

vestors' Protective Bond & Trust Company.

The foregoing will, in the judgment of the undersigned, ultimately produce and be equivalent to and pay to said trust company a sum greater than the par value of the 2,000 shares of stock hereafter mentioned; but, however, I do not so guarantee.

The consideration myself and associates demand for the foregoing is that your company immediately issue, as fully [128—35] paid up, 2,000 shares of the capital stock of your said company, to be issued to H. W. Wernse, as trustee.

Second: If your said company will issue an additional 1,000 shares of the capital stock of said company, fully paid up, I will pay or cause to be paid into the treasury of said company the sum of \$10,000, as wanted, and will secure for said trust company business sufficient to net to said company in due time the sum of \$90,000, or sufficient to pay said shares in full, said shares to be issued to said H. W. Wernse, as trustee and to be re-transferred to myself or such person or persons as I may direct as fast as paid for at \$10 per share.

I further agree that if this proposition is accepted by said company I will and do hereby consider said shares in full payment for all services rendered, and the compensation I am or may be entitled to therefor, for promotion and the organizing of said trust company.

It is distinctly understood that if this proposition is accepted by your company, I do not guarantee that said contracts or business so transferred as aforesaid,

(Testimony of H. W. Wernse.)

will produce sufficient money to pay up said 3,000 shares in full, and that I am not to be held at all liable should there be a deficiency in that regard; and that the trust company takes its chances as to the ultimate result.

I agree that if any of said contracts shall fail I will endeavor to secure for said trust company others equally as good.

Yours truly,

WM. H. H. HART,"

Mr. WHITMORE.—I ask that that be marked.

The COURT.—I would like to have that bank-book, too, in evidence. [129—36]

Mr. WHITMORE.—I will offer this bank-book "Plaintiffs' Exhibit 1," and that letter just read as "Plaintiffs' Exhibit 2."

The WITNESS.—I do not believe the company realized any money upon these trusts referred to in this document just read, unless it was, as the books show there; the books will show what was realized off of some contracts—the cash-book. Underwriting the Modern M. & M. Company,—\$100 fee on June 14.

The COURT.—That is not described in General Hart's letter?

A. It is a part of the business that came in through General Hart.

Q. How does this appear—how do you know?

A. I know from the business that was done, that was brought in.

Q. He speaks of contracts in that letter. This has

(Testimony of H. W. Wernse.)

nothing to do with any contract that he held, did it?

A. He agreed to produce business and this was some of the business.

Q. That letter deals with business that he then had secured. How could this relate to it?

A. I don't know where any of the contracts actually produced any money excepting in this way, where other business was furnished.

Q. Where are these contracts? Have you them among your papers?

A. I do not believe I have. Here is a commission agreement. Every one of these papers I do not find, just the bearing of them.

The COURT.—Q. Are you able to find any of these contracts referred to in that document?

A. There is a contract with the Stanislaus. I believe it was [130—37] referred to in the letter.

Q. Is that referred to in the letter?

A. I believe it was.

Q. It cannot very well be because it is dated two or three months after the organization of the company on the 26th of March. This is July 15, 1904.

Mr. WHITMORE.—Q. What were those contracts? You were connected with the company at that time?

A. Yes, I was interested in this transaction. One of these contracts was a contract for the sale of some property which was under way—looked like it would be closed up in a very short time. If I had that letter, I could tell each one as we go along. I [131—

(Testimony of H. W. Wernse.)

37½] have never read the letter since the fire. In this letter it says, first, the assignment of this option for making a Japanese loan. They had secured the money, that is, the promise of the money from New York, and the Japanese Government had promised to take it in their order; they were borrowing money from the United States, different loans were being made, and the war with Russia was ended before this loan was taken up. We had a letter from a representative of the Government here, contracting to take the loan, through General Hart. The second was the California Gold Recovery Company; that was a sale of some of their property; that was what I spoke of. Third, business of the Investor's Protective Bond & Trust Company; that was underwriting stock with bonds. The first business on that was this Modern M. & M. Company for which they paid a fee of \$100. The value of this 2,000 shares of stock that was to be paid was \$10 a share, \$20,000.

Q. Is that all they got out of it, that \$100?

A. They got 100,000 shares of the El Dorado Basin Gold Dredging Company stock. That is part of the other business.

Q. What do you mean by "the other business"?

A. He says here he would produce other business.

Mr. WHITMORE.—Q. Have you either one of the contracts that are referred to in this letter of General Hart?

A. I am just looking for them. [132—38]

It was admitted by counsel that the date of Mr. Hart's letter of proposal to the Monetary Trust Com-

(Testimony of H. W. Wernse.)

pany was the date of the organization of the company, March 26th, 1904, and that the date of the transfer of the 1175 shares of stock of the Point Richmond Canal & Land Company to the defendant Cutting by the Monetary Trust Company was December 20th, 1906.

Mr. WHITMORE.—Here is one of the contracts that he has produced. I will offer this in evidence, This is on the letter-head of the Investor's Protective Bond & Trust Company, dated San Francisco, California, December 29, 1903, I think it is intended for and addressed, "To Whom It May Concern." Have you any objection to it?

Mr. HART.—My own judgment is that this case will not turn upon this at all; it seems to me that this whole transaction depends upon the question, How much did Mr. Cutting pay directly or indirectly for this stock, and what was it worth at that time? There is no showing that these plaintiffs have any right to complain.

The COURT.—How do you mean, no right to complain?

Mr. HART.—They have not shown that they own any stock or bought any stock or anything else.

The COURT.—I thought that was conceded by your statement.

Mr. HART.—It is denied in the answer.

The COURT.—I understand, but denials are superseded by a statement which admits certain things. I understood your contention to be that

(Testimony of H. W. Wernse.)

the only material thing was this transaction between—

Mr. HART.—(Intg.) The answer admits that one of these plaintiffs owns five shares. There is no admission as to the balance. [133—39—40]

Mr. WHITMORE.—Q. Mr. Wernse, how did the company come to get this \$1,093 that the books show they hold in trust?

A. We accepted a trusteeship from the Pacific Underwriting & Trust Company and there was certain property which we received to be held in trust by us for them, and this money was money paid in to us in releasing the property out here in Sunset District; we hold the money in place of the property.

The WITNESS.—We have never been able to locate that company since 1906, the fire.

This stock-book—the stock certificate book, in fact, all these books have been kept by me in the safe all the time. I have never written in them that I know of; I just kept them for Mr. Betz.

This stock, 2,000 shares of stock that was originally issued, to me as trustee,—all those trustee certificates were cancelled and we issued other certificates. [134—41]

I can tell from the stock-books how much stock Mr. Cutting has in this company; it is in the books.

On April 30, 1904, he had 25 shares. He paid \$250 for that,—\$10 a share. January 9, 1905, 100 shares, for which he paid, \$1,000. He paid the money. The books show that. It was paid in installments of

(Testimony of H. W. Wernse.)

different amounts. I mean it is a part of this transaction we were going over yesterday. We did not issue the stock until there had been a lump sum paid. The next one is May 3, 1905, 305 shares; he must have paid \$3,050 for them.

Q. Have you got any account in your cash-book of the payment? You never received that money, did you, for this stock, that \$3,050?

A. The stock was issued on that basis, Mr. Whitmore, and I myself took it from the stock-book. It was paid in.

Q. You have not any account of that money received, have you? A. The cash-book, that is all.

The COURT.—Q. Has it ever been paid in?

A. Yes, it has been paid in. The cash has been paid in, and there were securities paid in which were taken by the directors and accepted as cash at a meeting of the board of directors.

The COURT.—That is absolutely meaningless. Show us what it was.

A. I want the minute-book. On the 17th of December, 1904, "After a discussion of the question by the board, it appeared for the best interests of the company that its promoters should have such stock only as has been paid for at the rate of \$10 per share, either in securities or money; and upon motion of H. C. Cutting and second of W. J. Morgan, it was unanimously resolved, that the company hereby accept the offer of the stockholders of this company to surrender all stock [135—42] except the following: H. C. Cutting, 100 shares; H. B. Mayo,

(Testimony of H. W. Wernse.)

220 shares; William H. H. Hart, 10 shares; H. W. Wernse, trustee, 1000 shares.”

Q. What has that got to do with this 305 shares?

A. It was after this date and it was either paid in by money or securities.

Q. What securities? Your books must show the property of the company. If the company received money, or if they received securities, the books should show. You do not keep things in the air, do you?

A. But our ledger was lost in the fire, and in that ledger appeared these securities.

Q. But you have been with that company now constantly all the way through. You have got some memory as to what securities came in. What were they?

A. We had 200,000 shares of El Dorado Basin Gold Dredging Company stock that was being sold at the rate of 25 cents and we took it in on the basis of 10 cents, and our minutes show we were going to offer it for sale for 20 cents a share. The Monetary Trust Company was the owner of that stock. We turned the stock over to it, Mr. Hart and myself.

Mr. Cutting paid for the 305 shares that I have just found a certificate, or the stub for, in cash.

I find that up to May 3, 1905, Mr. Cutting had paid in cash \$1,826.25. That 305 shares, if I remember rightly, the minutes will show it was issued to Mr. Cutting from that trustee stock. A part of these payments were paid in as the office required.

(Testimony of H. W. Wernse.)

I think the minutes would show that 305 shares was issued in lieu of part of that 1000 shares of the trustee stock. I do not find the minutes of that transaction. It was about May 3d, though, that we started to do the first work in Richmond on the canal. Mr. Cutting put the money up for that work. He subsequently had more stock issued, on October 14, 1905, 150 shares. And then January 5, [136—43] 1906, 80 shares. And September 1, 1906, this certificate, or the stub says, "Issued stock to Cutting at \$10 per share for expenses paid to and including December 1, 1905. September 1, 1906, 93 shares."

The WITNESS.—(Continuing.) \$159.25 was paid by Mr. Cutting in May, 1906, for office expenses and opening up a safe and getting up all the papers that we could from the safe to the other office. In June \$75 was paid by Mr. Cutting to me as salary. In July, \$75 was paid; that was also to me as salary, and during August, \$75 was paid to me as salary; September, \$75 was paid; I received it as salary. October, nothing. There was nothing paid to me; that was the last payment. The books show how much Mr. Mayo paid in for the benefit of this business. June 2, 1904, \$200; June 11, 1904, \$1000; June 30, \$30; October 26, 1904, \$25.

That was paid in after the \$1,000 in 1905.

June 2, 1904, \$200; June 11, 1904, \$1,000; June 30, 1904, \$30; October 26, 1904, \$25; January 10, 1905, \$300; February 1, 1905, \$100. I guess that is all.

(Testimony of H. W. Wernse.)

The COURT.—Q. What stock did Mr. Mayo have?

Mr. WHITMORE.—Mr. Mayo had the stock of the plaintiffs in his name, but it was really the stock of one of the plaintiffs in this case, a portion of it is.

Q. Didn't Mr. Mayo pay in \$5,000, Mr. Wernse?
* * *

A. No, I don't remember that. I don't remember any time that he had \$5,000 paid in in a lump.

In the Journal on April 1, 1904, Mr. Mayo paid \$125 on account of the rent; he paid that direct and we gave him credit for it. On May 23d, 1904, Mr. Mayo had advanced \$4.70 for advertising and telegrams. May 11th, 1904, Mr. Mayo paid Mr. Bishop for the office furniture which was in the office when we took it over,—\$350. On May 31, 1904, Mr. Mayo paid [137—44] \$850 for some Marconi stock—70 shares of Marconi stock.

On May 31, Mr. Mayo paid \$3.25 for telegrams. On February 28, 1905, Mr. Mayo turned over to the trust company a note of W. H. H. Hart for \$1,000 with interest thereon of \$210. That note was cancelled, paid by General Hart paying bills of the company after the fire. That meeting was just held recently when the note was taken up and discussed at a meeting, about a month or two ago. It does not appear here; it appears in the minute-book.

The COURT.—Q. It must have been carried on

(Testimony of H. W. Wernse.)

your books as an asset. How did you write it off?

A. That entry has not been made as yet, your Honor. It was just a few months ago and there is no entry made. I have to make all the entries and everything else that has been done, and my time is so occupied, it is impossible to do it; that is all.

Mr. WHITMORE.—Q. Will you turn to the stock-book again and tell us how much stock stands in the name of either one of the Woodwards, the plaintiffs in this case?

A. F. A. Woodward, one share, January 5, 1905, 4 shares January 5, 1905. That is 5 shares.

Mr. WHITMORE.—Q. How much stands in the name of Mr. H. B. Mayo?

A. 5 shares, March 26, 1904. 50 shares issued March 30, 1904. 100 shares, January 9, 1905. 160 shares January 9, 1905. 200 shares, January 9, 1905. 90 shares, January 9, 1905. That is all.

I hold that stock in trust, issued to me as trustee, for myself. I have never paid anything to the company for that stock only securities. These securities and the property that I turned over to the company for that stock are 100,000 shares of El Dorado Basin Gold Dredging Company's stock.
[138—45]

The COURT.—Q. Tell us about that. What was that institution?

A. A company that owned valuable placer claims at El Dorado Basin in Arizona. Nothing was ever realized out of it, but at that time Mr. Mayhew and

(Testimony of H. W. Wernse.)

Mr. Brownell, two successful dredger men up in Oroville, had passed on the property and were going to put a dredge on the property; in fact, they went down, made their preliminary tests and reported that the property would pay, pay handsomely.

* * * This company did not take anything that was offered them in the way of alleged securities and issue their stock for it; but they investigated this. They had nothing to do with the working of it. They had Mr. Brownell and Mr. Mayhew; they were practical men in the dredging business.

Q. They were entirely in the hands of other people as to whether they should realize anything in it or not?

A. It was a different corporation; had different directors and officers than the other corporation.

The way we got that interest in the El Dorado Basin Gold Dredging Company, the prospector who found the property came to General Hart and myself with it and we looked into it and secured the parties to put up the money to make a preliminary examination and bought the property. It stood me two or three months' time with these people going through with them, finding somebody who would take it,—who would take it over and work it, who were successful men, who understood the gold dredging business. I never put any actual money in it; I invested my time.

Mr. WHITMORE.—Q. Do you know whether General Hart put any money into it?

(Testimony of H. W. Wernse.)

A. Only I suppose in financing this prospector from time to time to live on while he was here.

The capital stock of that company was \$3,000,000.

I could not tell you offhand how much stock General Hart [139—46] got; I think 300,000 shares.

Q. And you unloaded it on to the Monetary Trust Company for the stock that you received from that company?

A. No, I did not unload it. We transferred it to them.

Mr. HART.—I will waive cross-examination and call him directly. Counsel would probably object to a great many questions I might ask on cross-examination, and I will put them in as my own testimony. That is all for the present, Mr. Wernse. [140—47]

[Testimony of Henry B. Mayo, for Plaintiffs.]

HENRY B. MAYO, called for the plaintiffs and duly sworn, testified as follows:

I am the H. B. Mayo mentioned in the minutes of the Monetary Trust Company as one of the directors of that company. I am acquainted with the plaintiffs, the two Woodwards, in this action.

Mr. WHITMORE.—Q. The evidence here shows that you have 605 shares of stock of that company. Just state to the Court who is the equitable owner of that stock.

Mr. HART.—I object to that question as calling for the conclusion of the witness instead of the fact.

The COURT.—Yes.

(Testimony of Henry B. Mayo.)

Mr. WHITMORE.—State the fact in reference to the acquisition of that stock by you.

The COURT.—The ownership of the stock.

A. When the company was incorporated by General Hart and myself, we were the owners and promoters of the company; it was agreed that we should each take 500 shares of promotion stock for our services in incorporating the company, and that we were to have the privilege of buying 500 more shares at \$10 a share. I told General Hart that I had a client in Peoria, Illinois, that would take my 500 shares, and give us \$5,000 for it, a Mr. H. J. Woodward; he sent me \$5,000 and I paid it over to the company for the 500 shares.

Q. Then these 500 shares of stock belong to H. J. Woodward?

A. H. J. Woodward, yes, one of the plaintiffs in this case. He resides in Peoria, Illinois. The other 105 shares belong to me. 500 shares belong to Mr. H. J. Woodward, and five belong to Mr. F. A. Woodward, and 105 to me. For Mr. H. J. Woodward I paid in \$3,000 in one thousand dollar payments. I turned over to the company General Hart's note for \$1,000 secured by 300 shares of the stock of the Monetary Trust Company, and for Mr. Woodward I [141—48] paid in another \$1,000 in payments at different times when the company needed the money. On my account, for my own hundred shares, I paid in \$1,000, in payments at different times.

Q. Do you know anything about the payment that has been made to this company for the stock issued to Mr. Cutting?

(Testimony of Henry B. Mayo.)

A. Myself and Mr. Woodward are the only people who ever paid any money into the Monetary Trust Company, except so far as Mr. Cutting paid his own office expenses where ostensibly the offices of the Monetary Trust Company were held. The Monetary Trust Company itself has done no business or has had no use for an office or a corps of assistants or clerks, or their help. The Monetary Trust Company has had its office with Mr. Cutting, and the books of the company have always been and still are there. The only business that the Monetary Trust Company has had from its inception of any amount was the incorporating and financing of the Point Richmond Canal & Land Company which was undertaken right after the Monetary Trust Company was incorporated. The Monetary Trust Company paid the expenses of incorporating the Point Richmond Canal & Land Company and paid for the bond issue which the Point Richmond Company made and bought the land in Point Richmond, and attended to the work and paying the expenses of everything that was done for the first few months of its existence. * * * The Point Richmond Canal & Land Company. For this they were to receive one-half of the stock and they were to promote the sales of the bonds and the stock. Mr. Reichart and myself had secured this land from Mr. Mintzer and turned it over to the Monetary Trust Company, and we were to retain one-half; the thing stood in that condition for some months. The Monetary did not succeed in selling its stock or its bonds and Mr. Cutting, who was then president of

(Testimony of Henry B. Mayo.)

the Monetary and had absolute control of it; as he was also president [142—49] of it and in absolute control of the Point Richmond later on, Mr. Cutting offered to take over the Point Richmond proposition—the company had \$64,000 of its bonds in the treasury and had an equity in this land. Mr. Cutting offered to take enough bonds to start the sale of lots in Point Richmond and put the property on the market.

The WITNESS.—(Continuing.) I was not at the meeting at the time of this transfer of the 1175 shares of the Point Richmond Canal & Land Company's stock to Mr. Cutting. I think I was in the office the day afterwards. As to whether Mr. Cutting paid any money at that time or not, I only know what Mr. Wernse told me the following day of two after. I was living at Sacramento at that time, and whenever they would hold a meeting—whenever they called a meeting, either of the Monetary or the Point Richmond directors or stockholders, by giving me a notice, that was received generally after the meetings were held. If I received it and came down here the meeting was postponed; so that I did not get to attend very many meetings at that time. The day after the meeting was held I was here and Mr. Wernse told me Mr. Cutting had bought the stock and given his check for it and they had immediately loaned the money to Mr. Cutting.

Q. Where was the office of the Point Richmond Canal & Land Company?

(Testimony of Henry B. Mayo.)

A. It was always with the Monetary.

Q. That was in Mr. Cutting's office? A. Yes.

Q. At all times?

A. At all times. I objected to the sale of this stock to Mr. Cutting on the ground that Mr. Cutting had agreed to carry the interest of the Monetary in consideration of having received 51 per cent of the stock for nothing; but he was in control of the Monetary.

Q. 51 per cent of what stock? [143—50]

A. Of the Point Richmond Canal & Land Company. He was given 51 per cent of the Point Richmond Canal & Land Company stock for absolutely nothing. It carried with it the \$64,000 in bonds. He agreed at that time that he would—

Mr. HART.—I object to it on the ground that if there is any agreement, it should be called for and produced.

The COURT.—If it is in writing, it should be produced or accounted for.

Mr. WHITMORE.—Q. Do you know of any agreement in writing with Mr. Cutting to that effect?

A. I don't think there was any; it was not entered upon the minutes of any meeting that now certifies it. What the Point [144—50½] Richmond Canal & Land Company minutes might show if they were here, I don't know. I suppose they were destroyed in the fire.

On cross-examination the witness testified as follows:

I never had a contract for the land that was afterwards owned or claimed by the Point Richmond

(Testimony of Henry B. Mayo.)

Canal & Land Company. Mr. Reichart had charge of the negotiations and he may have had a contract, but if he did, I don't know it; I never saw it, and don't know the terms except as we carried them out. I know we gave the bond issue and received the deed.

The Point Richmond Canal & Land Company was organized about a month after the Monetary—about the 1st of April, 1904. The Monetary Trust Company organized that Company. Mr. Reichart and myself, and I think Mr. Betz organized the Point Richmond Canal & Land Company.

The COURT.—General Hart was mistaken in saying, then, that the Canal Company was organized, as the parent company, before the Monetary Trust Company was organized?

A. He certainly was; I brought the Point Richmond property to this company; I saw the property. Mr. Reichart and I were in partnership in the proposition, and then by our joint work we got an agreement with Mr. Mintzer to convey the property for bonds. That was not put in writing that I know of it was carried out. I told Br. Reichart when we first planned getting the land, “we have just incorporated and promoted a company, the Monetary Trust Company, which I think can handle the Point Richmond land.” It pleased him, and we agreed between ourselves to give the Monetary a half interest for handling it. It was submitted to the Monetary Trust Company before the Point Richmond Company was incorporated. I had the Point Richmond matter under [145—51] consideration before the

(Testimony of Henry B. Mayo.)

incorporation of the Monetary Trust Company. We organized the Monetary Trust Company with General Hart, for the purpose of handling any proposition that came up in our respective practice. You were not a director in either company; you were always interested. There were about 400 acres of land in this contract; it was what I would call swamp and overflow land, under water at very high tide.

A. It was salt marsh and tide land. It was right on what is known as the South Marsh, extending from the Santa Fe Depot in Richmond. It was a salt marsh, overflowed by salt water.

Mr. HART.—Q. The Point Richmond Canal & Land Company in short was incorporated and this property was deeded to that corporation by Mr. Mintzer who had the legal title—that is, the title of record; is that correct?

A. Mr. Mintzer—I think his mother-in-law,—the Tuxberry estate, the owners of the land, deeded it to the Point Richmond.

\$400,000 worth of bonds were issued on the land; there was no money paid. The terms of the bonds permitted the sale of the land.

The COURT.—Q. What terms were the bonds, 10, 20 or 30 years?

A. 20 years, I think; I don't remember. I signed them all, but I don't remember what was the actual date of them. It must have been about in May or June, 1904, I should think.

The COURT.—Q. What was the consideration for the land; how many bonds?

(Testimony of Henry B. Mayo.)

A. \$336,000 worth of bonds were given for the land and \$64,000 were retained by the Point Richmond Canal & Land Company by consent of the former owners for the purpose of developing land. I [146—52] put the expense of incorporating the corporation up to the Monetary and the Monetary put it up to the Point Richmond. I think the first amount was three or \$400—it was a five hundred thousand dollar corporation. What I paid, I paid into the office; the Monetary paid the fees; the books of the Monetary show they paid the fees and they are there. I was president of the Monetary Trust Company for the first few months, up till the time Mr. Cutting came into the office. These bonds were signed by me as secretary of the Point Richmond Canal & Land Company. I think those bonds were issued before Mr. Cutting came into the Monetary Trust Company, but I could not say positively—about that time. The Central Trust Company was the trustee, I think.

Mr. HART.—Q. Who was to pay the expenses of incorporation, that is, in creating the mortgage for the payment of the bonds?

The COURT.—Of the Point Richmond?

Mr. HART.—Yes.

A. The only expense there was, I think, was \$200; the trustee wanted some money and the Monetary paid it. The preliminary costs of the creation of the Point Richmond Canal & Land Company were advanced either by me or by the Monetary Trust Company. That is about all the money that was put into

(Testimony of Henry B. Mayo.)

the Point Richmond Canal & Land Company by the Monetary Trust Company. The bonds alone, the printing of the bonds alone cost more than \$500, I think. I think the Monetary has put in a thousand dollars. I don't think the printing of the bonds was ever paid for—the fire came along. The Monetary Trust Company paid the actual money that was out. I think it was about a thousand dollars.

Q. Then, at the time that the Monetary Trust Company made this arrangement with Mr. Cutting to transfer the 1175 shares, providing it was an arrangement of that kind, the Monetary Trust [147—53] Company had not put in more than a thousand dollars into the Point Richmond Land & Canal Company?

A. That was several years after; I could not say—two years and a half.

The COURT.—Several years after the issuance of the bonds? A. Yes.

The Monetary sold Mr. Cutting \$10,000 worth of the bonds of the Point Richmond Canal & Land Company upon his agreeing to take more when that money was spent, and we gave him control of the Point Richmond Canal & Land Company for absolutely nothing. I am sure of that; the books show that. I presume the books will show more accuracy than I can state how the stock of the Point Richmond Canal & Land Company was divided originally. I think that the entire capital stock of the Point Richmond Canal & Land Company was issued to Mr. Reichart for the transfer of that prop-

(Testimony of Henry B. Mayo.)

erty. Mr. Reichart and I were equal owners in the proposition. I think Mr. Reichart had an office at the time that we organized that company in the Mutual Savings Bank Building, that is, Fred Reichart, Mr. Reichart served as a director in the Monetary Trust Company, I think, one or two months; it was some time during the first year of its existence. The Monetary Trust Company undertook to sell sufficient bonds and stock to raise the money to improve this land at Richmond and to fill it in and to make it marketable; it undertook to sell sufficient bonds and stock to put the land on the market. I have said before that the Monetary Trust Company conveyed to Mr. Cutting a majority of the stock which carried with it absolute control of the company and of the bonds. Mr. Cutting agreed to take \$10,000 worth of the bonds and pay for them, and when \$10,000 of money was exhausted, that he would take more bonds or get his friends to do so.

The COURT.—What do you mean, that he was to take these securities and exploit the land? [148—54]

A. Exploit the land, and carry one-quarter for the Monetary Trust Company and one-quarter for Mr. Reichart.

Mr. HART.—Q. Now, you have already stated that the entire stock of the Point Richmond Canal & Land Company, with the exception of the qualifying shares of the directors was transferred to Mr. Reichart for the transfer of the Tuxberry contract. Now then, how did the Monetary Trust Company

(Testimony of Henry B. Mayo.)

get the control of that stock?

The COURT.—Q. How did that stock get out of Reichart into the Monetary Trust Company?

A. There were meetings and the parties came to an agreement. By agreement between Mr. Reichart, the Monetary Trust Company and Mr. Cutting; the agreement was not in writing, but it was carried out. [149—55—56]

How did the canal company stock get into the hands of the Monetary Trust Company? I am not asking how much there was of it, or anything, but how did it get in there?

A. It was transferred to the Monetary out of the entire stock which was originally issued to Mr. Reichart when all the parties concerned came to an agreement as to what should be done.

Q. What was that agreement?

A. The agreement in the first instance was, although it was never issued—

Q. (Intg.) You mean never consummated?

A. Never consummated,—was that the Monetary was to float the proposition and raise the funds for a one-half interest.

Q. That was not carried out?

A. That was not carried out—that was carried out, in this way: They produced Mr. Cutting—the Monetary produced Mr. Cutting and Mr. Cutting was given control of the company.

Q. For the purpose of carrying that out?

A. For the purpose of carrying it out. In order to get Mr. Cutting his half Mr. Reichart had to give

(Testimony of Henry B. Mayo.)

up one-half of his interest and the Monetary had to give up one-half of its interest which gave Mr. Cutting control.

Mr. HART.—Q. When was that transaction that you have just answered in the last answer carried out?

A. I think it was about December, 1905, but the books will show; I don't remember. [150—57]

AFTERNOON SESSION.

Cross-examination of HENRY B. MAYO, resumed.

Mr. HART.—Q. Mr. Mayo, when we adjourned, you gave an answer, in substance, to questions I put to you how the stock of the Point Richmond Canal & Land Company was divided, you said that the books would show. Now, tell us what books you refer to.

A. I merely said that I supposed that if the Point Richmond Company had kept any books, that their stock certificate book would show how the stock had been issued. I don't know. I was an officer at the beginning, yes.

The WITNESS.—(Continuing.) It is a fact that the original talk between Mr. Reichart and myself was that the Monetary Trust Company would undertake to finance the Point Richmond Canal & Land Company. Our first talk was before Mr. Cutting was connected with it, and also before Mr. Cutting had any interest in the Point Richmond Canal & Land Company. There was never any contract in writing, in any of the affairs involving the buying or the incorporating of the Point Richmond,

(Testimony of Henry B. Mayo.)

so far as I know. It was a family affair, among ourselves, and arranged as I have said. I think it was just after the incorporation of the Point Richmond Canal & Land Company that Mr Reichart and I were interested in this Richmond land deal. Mr. Reichart had one-half interest and I had a half interest. I think that was the status of the situation in reference to the Richmond land before the incorporation of the canal company.

Q. Was that arrangement with Mr. Reichart before the incorporation of the trust company?

A. They were both incorporated about the same time, I mean being negotiated, talked of, the same time.

The COURT.—Q. It was all one scheme, was it?
[151—58]

A. No, your Honor, the Monetary was first formed. It was all intended to carry one scheme out, both corporations, practically. The Monetary corporation was first formed, and it was formed without any reference to the canal company. It just happened that the canal company came to my notice immediately thereafter, or about that time. I mean the canal project. It was the project first that was turned over to the Monetary or talked of to the Monetary, and it was the Monetary that put up the money to incorporate the canal company, and it then was done, in regard to buying the land and issuing the bonds and incorporating.

Mr. HART—Q. Now. you have said in answer to your counsel that you had paid in \$5,000 of money

(Testimony of Henry B. Mayo.)

into the Monetary Trust Company? A. Yes.

Q. To whom did you pay that?

A. To Wernse, I believe.

The COURT.—Q. Now was it paid, by check?

A. It was paid in before the fire, and I have not got any record showing just how it was paid, but I think the \$3,000 was paid by check and some of the other was.

It was paid at different times,—that is, three one thousand dollar payments.

Q. Was not one of these payments the note which I gave you?

A. No; my recollection is the three payments of \$1,000 preceded the \$1,000 note.

Q. That was what was known as the Averill note?

A. I believe, now that you speak of it, it might have been to Averill; I don't remember, but it was your note.

Q. As a matter of fact, was the canal company's project consummated orally, we will say, that is, the arrangement, before you paid that money in, or afterwards?

A. That I could not say. I certainly had not paid it all in when the Monetary first took over the Point Richmond. [152—59] As a matter of fact, I am not clear as to the dates of each particular transaction.

The COURT.—Q. Were your records destroyed?

A. Yes, absolutely all of them.

The Monetary Trust Company first went into the building on New Montgomery Street at its very in-

(Testimony of Henry B. Mayo.)

ception, the day or week or month I could not remember. Its office was in the Crossley Building, at the entrance of the Crossley Building on New Montgomery and Mission, right at the street entrance. The Monetary Trust Company was the only occupant there until Mr. Cutting came in. At that time I had six offices in the Crossley Building—I mean six rooms, upstairs. Mr. Wernse was in the Monetary Trust Company's office when Mr. Cutting came in; that was all, I think. Mr. Morgan came in more than a year later. My recollection is that Mr. Morgan came in sometime during the year 1905. At that time I knew Dan Van Wagenen. I met him in your office; I think he was a promoter. Just at the time the Monetary was first incorporated Mr. Van Wagenen left San Francisco and remained away for several years. About the Japanese loan, I don't think there was anything about that but wind. I don't know who suggested the Japanese loan, but I don't think there was ever anything to it.

Q. Now, I notice here that in this organization meeting that the minutes read as follows, at least that part of it: "Pursuant to notice, duly given, a meeting of the persons named as directors in the articles of incorporation of the Monetary Trust Company was held this 26th day of March, 1904, at 11 o'clock A. M. at room 417 Crossley Building, San Francisco, California." That was at your office, was it not? A. Yes. [153—60]

Q. "At this meeting of the persons so named were present, H. B. Mayo, W. J. Morgan, H. W.

(Testimony of Henry B. Mayo.)

Wernse and Albert Betz. Absent: Dan Van Wagenen. It appeared that Dan Van Wagenen had in writing waived notice of this meeting and had executed a proxy to H. B. Mayo to be voted if a stockholders' meeting was held." Is that correct?

A. Yes.

Q. "Mr. H. B. Mayo was called to the chair, and Mr. Albert Betz was requested to act as temporary secretary. Mr. H. B. Mayo in the chair announced that the certificate of incorporation of the company having been duly issued from the office of the Secretary of the State of California, the object of the meeting was to organize the company and the board of directors by the election of officers as required by law." Those minutes are correct, are they not?

A. Those you have read are. I presume I read them over at the time, if I signed them, but I don't remember now. I don't remember whether I signed them or not. I am not certain as to the dates in an outside matter of that kind. I was practicing law at the time. While I did some business with the Monetary Company, I don't remember the date of every transaction.

Q. Now, this first stockholders' meeting, which appears on page 4 of the minute-book, recites as follows:

"First stockholders' meeting of the Monetary Trust Company. We, the undersigned, the stockholders and subscribers for stock of the Monetary Trust Company, being the owners and holders of all

(Testimony of Henry B. Mayo.)

the subscribed capital stock of said company, viz: H. B. Mayo, 5 shares; W. J. Morgan, 5 shares; H. W. Wernse, 5 shares, Albert Betz, 5 shares, Dan Van Wagenen 5 shares, represented by H. B. Mayo, proxy, do hereby give our written consent to the holding of this the first stockholders' meeting of the Monetary Trust Company, this 26th day of March, A. D., 1904, at the hour of 11–15 o'clock A. M., at room 417 [154—61] Crossley building, San Francisco, California; and we do hereby certify that all the stockholders and subscribers for stock of said company are at this meeting now here present or represented.

In Witness Whereof, we have hereunto subscribed our names this 26th day of March, A. D., 1904.

H. B. Mayo; W. J. Morgan; H. W. Wernse; Albert Betz; Dan Van Wagenen, by H. B. Mayo, attorney in fact."

Those are correct, are they not?

A. Yes. Mr. Betz and Mr. Wernse represented the interest in the stock that they owned was your stock. What stock Mr. Morgan had I think he got from you; he didn't get it from the company, and he also appeared on the board as your friend.

The understanding was that we were to have, you and I were to have five per cent each for promotion, —for promoting the Monetary Company, and that we were to do all we could to get business into the company; that was the sum and substance of the

(Testimony of Henry B. Mayo.)

whole thing. In other words, that the organization was for the purpose of promoting, a promotion company, to carry out the business of promotion; and to do that it was necessary to have certain moneys for temporary use.

There were no subscriptions for stock that I know of for less than par except 500 shares that was allowed you for \$5,000 and 500 shares to me for \$5,000; I don't think there was any stock authorized to be sold for any less than par outside of that. That was before the company attempted to do any business; I think it was within 60 days after the organization. I think it was within a week or two; I have not got the dates in my mind.

Q. I find here on page 7 of the minute-book of the Monetary Trust Company, a directors' meeting, which is in the usual printed form: [155—62]

“Directors meeting held on the 26th day of March, 1904. Mr. H. B. Mayo, president of the board, presiding. The secretary read the minutes of the previous meeting of the board, held for the purpose of organization, which, on motion duly seconded, were approved. The secretary was then directed to read to the board the code of by-laws adopted by the stockholders at their first meeting held this 26th day of March, 1904. The secretary then read the by-laws as the same are engrossed on pages of the company's book of By-laws. Thereupon, on motion of Mr. W. J. Morgan, seconded by Mr. H. W. Wernse, it was unanimously resolved

(Testimony of Henry B. Mayo.)

that the code of By-laws adopted by the stockholders at their first meeting, held on the 26th day of March, 1904, and engrossed in full on pages of the book of By-laws of this company, be and hereby are adopted as the by-laws of the company; and be it further Resolved: That each member of the board of directors, and the secretary of the company be and hereby are requested to subscribe their names to the said by-laws and certify the same in that certain book, to be kept in the office of the company, and known as and called the book of By-laws of the Monetary Trust Company. On motion, duly seconded, it was unanimously Resolved: That the office of the company be and is hereby fixed and located at No. 79 New Montgomery Street, in the city and county of San Francisco, State of California."

The WITNESS.—It is a fact that 79 New Montgomery Street was the office that was opened by the Monetary Trust Company.

Mr. HART.—Now, I suppose that your Honor will permit us in making up a digest of these by-laws for the purpose of argument or brief, as the case may be, to refer to them without calling the witness's attention to each particular entry. They are all offered in evidence, your Honor.
[156—63]

The COURT.—Certainly. Of course if you examine the witness on any statement that is covered by the by-laws, you should call his attention to it.

(Testimony of Henry B. Mayo.)

Mr. HART.—Certainly, that is what I expect to do.

Q. On page 10 of these minutes I find the following:

“Meeting of the board of directors of The Monetary Trust Company, held at the office of the company, No. 79 New Montgomery Street, San Francisco, Cal., on June 11, 1904, at 3 o'clock P. M., pursuant to notice. Present: H. B. Mayo, president; W. J. Morgan, Vice-president; H. W. Wernse; and Albert Betz, Secretary.

The object of the meeting was to pass a resolution providing for the issuance of certain bonds. The minutes of the former meeting were read, and, upon notice of H. W. Wernse and second of W. J. Morgan, were approved as read.

Upon motion of H. W. Wernse and second of W. J. Morgan, it was unanimously resolved that a regular series of bonds be issued as follows”: Do you remember about that series of bonds, that it was here proposed to issue?

A. I remember that you suggested an issue of that kind be made.

The COURT.—That was by the Monetary Trust Company, was it?

Mr. HART.—Yes, but not on this canal project.

The COURT.—I am following you. They were never issued?

The WITNESS.—No.

Mr. HART.—They were printed and ready for

(Testimony of Henry B. Mayo.)

issue when the fire came and upset the whole situation.

The WITNESS.—I remember that we got up a form of the bonds given. It is in the minute-book, it is probably correct. I don't remember.

The object of these bonds was to use them as investment bonds, [157—64] the people paying for them.

Q. I notice on page 20 of the minute-book, meeting of June 11, 1904, the minutes state:

“On motion of H. W. Wernse and second of W. J. Morgan, it was unanimously resolved that the executive committee of this company be and it is hereby authorized to arrange one or more trust companies or banks to act as trustees for the holding of the securities of this company belonging to the bond sinking fund, and to arrange to have such bonds certified by said trust companies or banks, and that the result of such action be submitted to the board of directors for approval.”

A. I think that was passed at your suggestion.

Q. Have you any independent recollection of when Mr. Cutting began having any connection with the Monetary Trust Company?

Mr. WHITMORE.—I object to that question upon the ground that it is not cross-examination and that the record would be the best evidence.

The COURT.—I think so.

Mr. HART.—Q. I notice herein the meeting of January 7, 1905, a resolution as follows: “Mr. Mayo

(Testimony of Henry B. Mayo.)

offered his resignation as director of the Trust Company. Upon motion of Mr. F. A. Woodward, seconded by Mr. W. J. Morgan, the resignation was unanimously adopted." [158—65—66—67]

Q. (Continuing.) "Mr. Reichart just telephoned that he was willing to accept a directorship in the company and would pull the thing through all right."

Isn't it a fact at that particular meeting, when that statement came, it was because of that statement that you resigned?

A. No; Mr. Cutting always objected to my being president and said that if I would resign in his favor and let him become the president, that he would put money into the company and get his Nevada friends to invest also in the company, and Mr. Reichart was suggested at that time as a director because the Point Richmond Land & Canal Company and the Monetary Trust Company were doing business together and Mr. Reichart wished to be on the Monetary board, feeling that he could help the Monetary float the Point Richmond proposition.

The COURT.—You resigned both as president and director?

A. I resigned both as president and director, at the request of the other members on the board.

Mr. HART.—I will ask you, Mr. Mayo, whether you voluntarily resigned or whether it was because of the insistence of all the parties and myself included?

(Testimony of Henry B. Mayo.)

A. I resigned because Mr. Cutting asked me to resign and let him become the president.

I resigned as president and director. I believe Mr. Cutting was then elected. I don't remember whether I resigned as director first or president first. If I resigned as a director first, I would cease to be president. Mr. Reichart only remained on the board, I think, about two weeks, or possibly a few weeks, and then I was returned to the board.

Q. Now, I find here on page 27 of the minute-book the following: "Meeting of the board of directors of the Monetary Trust Company, held at the office of the company, March 27, 1905, pursuant to notice. [159—68]"

Present: H. C. Cutting, President; W. J. Morgan, Vice-president; Fred Reichart, and Albert Betz, Secretary.

Absent: F. A. Woodward, who had been duly notified of the time and place of the meeting. A quorum being present the president called the meeting to order.

Mr. Morgan offered the following resolution:

Whereas, the executive committee of this company some time ago entered into an oral arrangement with Mr. Fred Reichart, who was then not a director of this company, in connection with the carrying out of the Point Richmond Canal & Land Company's project; and

Whereas, this company having by reason of its inability to sell bonds of the Point Richmond Canal & Land Company, and for the further reason that

(Testimony of Henry B. Mayo.)

the Hackett Dredger could not do the work, failed to carry out its part of the agreement with said Reichart; therefore, be it.

Resolved: That in consideration of said Reichart transferring to the Monetary Trust Company 1175 shares of the capital stock of the Point Richmond Canal & Land Company, said Reichart and said canal company are hereby released from transferring any further shares of said stock in this company, the consideration for said shares so transferred being for past services rendered by this company, and for such services as it may be called upon to render in the future."

A. That was in pursuance of the arrangement that was finally made as to how the Point Richmond stock should be divided. Mr. Cutting took control of it and received 50 per cent and more of the stock without any expense himself, and Mr. Reichart intended to retain one-quarter, and the Monetary was given one-quarter.

Q. (Reading:) "Said resolution being duly seconded was [160—69] unanimously adopted. Mr. Fred Reichart informed the board of directors of this company that, having failed to carry out its arrangement with the Point Richmond Canal & Land Company, said arrangement had become null and void; and, thereupon, on motion of W. J. Morgan and second of Albert Betz, upon vote of Cutting, Morgan and Betz said arrangement was declared null and void; Mr. Reichart being excused from voting. There being no further business be-

(Testimony of Henry B. Mayo.)

fore the board, the meeting upon motion duly made and seconded, adjourned.”

The COURT.—What was that that was revoked, that had never been carried out?

Mr. HART.—The original contract for the purpose of carrying out the canal business, the business of the canal company.

The COURT.—What contract?

Mr. HART.—The oral contract, as they state here, that the Monetary Trust Company was to raise the funds for the purpose of improving the property. As a matter of fact, if your Honor please, there never was any contract in writing on that subject, so far as I know.

Q. Do you know of any, Mr. Mayo?

A. No; that arrangement that you have just read from the minutes superseded all previous arrangements, as I understand it; the Monetary was given this one-fourth, Mr. Cutting one-half and Mr. Reichart got his one-quarter. That was the end of the proposition. That was the way by which the Monetary Trust Company became the owner of this 1175 shares of the Canal Company stock. From that time on the Monetary performed its services and was not required to do anything further. If I was at the meeting, I was aware of the passage of this resolution.

Q. Well, it was on March 27, 1905. [161—70]

The COURT.—Was he present at the meeting?

Mr. HART.—He had resigned at the meeting of January 7th. I am asking him if he was aware of

(Testimony of Henry B. Mayo.)

that fact.

The WITNESS.—I consented to that distribution of the stock.

I do not remember how much stock Mr. Cutting got at that particular time,—actually got of the canal company. I know he was given control; by that, I mean he got a majority. I don't know how the stock was issued. I know the arrangement we reached at the time.

The COURT.—Q. You mean you don't know how it was carried out, but that was the understanding?

A. That was the understanding.

I still retained my office in the Crossley building—my office was in the Crossley building at the time of the fire.

I was again elected a member of the board; I think it was two or three weeks later, but it might have been more. It was probably the following meeting, but it may have been two months; I don't remember the time.

Q. I notice here on page 29 of your minute-book: "Meeting of the stockholders of the Monetary Trust Company, held at the office of said company, No. 79 New Montgomery Street, April 22, 1905, at 10 A. M.

The meeting was called to order by the president, Mr. Cutting, all shares issued being represented.

The president announced that nominations for directors were in order, whereupon, H. W. Wernse nominated the following for directors: H. C. Cutting; W. J. Morgan; H. B. Mayo; Albert Betz

(Testimony of Henry B. Mayo.)
and F. A. Woodward.”

Thereafter they were elected?

The WITNESS.—I think that was the meeting at which I was re-elected a director. [162—71]

Q. Now, on page 30, the minutes recites a meeting of the board of directors of the Monetary Trust Company held at the office of the company, June 17, 1905, pursuant to notice. “Present: H. C. Cutting, President; W. J. Morgan, Vice-president; H. B. Mayo; Albert Betz, Secretary. Absent: F. A. Woodward.

It was moved by Albert Betz, seconded by H. B. Mayo, that the Monetary Trust Company accept the proposition of H. C. Cutting and W. J. Morgan to remodel the office by changing the partition to their liking, on the terms and conditions agreed upon between Mr. Morgan and Mr. Cutting, and permitting their respective signs on the front windows, the name of the Monetary Trust Company to be on both doors. Messrs. Cutting and Morgan to bear expenses of change.

There being no further business the meeting adjourned.”

It is signed, “Albert Betz, Secretary.”

Those minutes are correct, are they not?

A. I could not say as to who made those motions. From that time on I had nothing to do with the management of the Monetary. I probably did appear at that meeting.

Mr. Cutting had been using this office at 79 New Montgomery street, as his office to the exclusion of

(Testimony of Henry B. Mayo.)

every other line of business for a year before June 17, 1905.

He was running a regular stock brokerage business and Mr. Wernse was every morning at the stock board buying and selling stocks there—as early as 1905,—earlier than that. I don't recollect just what time Mr. Cutting started to do a stock brokerage business, but I think it was very soon after he went there.

Q. Now, I call your attention to these minutes on page 31: "Meeting of the Monetary Trust Company, held September 3d, [163—72] 1906." That is the next meeting.

"Present: H. C. Cutting; W. B. Mayo; W. J. Morgan; Albert Betz. Absent: F. W. Woodward. It was moved by W. J. Morgan and seconded by Albert Betz, that room 404, 925 Golden Gate Avenue, be made the office of the Monetary Trust Company, until the further order of the board of directors. Unanimously carried.

On motion of Albert Betz and seconded by W. J. Morgan, it was unanimously resolved that

Whereas, the annual meeting of the Monetary Trust Company not having been held, therefore said annual meeting is called for Saturday, September 29, 1906, at 12 M., at the office to said company, room No. 404, 925 Golden Gate Avenue, for the purpose of electing a board of directors, and taking into consideration whether or not the assets of the company be disposed of, such steps shall be taken

(Testimony of Henry B. Mayo.)

for the purpose of raising funds for carrying out the work at Richmond, and such other business as may possibly come before the board, and that the secretary make the necessary publication."

Do you remember that resolution?

A. No, I cannot say that I remember what resolution was passed. I remember that is what transpired. I remember that there was a meeting there after the fire to kind of get ourselves together. The Monetary Trust Company's office was at 79 New Montgomery Street in the Crossley building at the time of the fire in April, 1906. That building was destroyed and burned with the rest. I was not there when the safe was opened. They had a safe there. I know the manager of the Hall Safe Company came to me before he put it in there and wanted me to give him an order to put it in,—a large safe that must have weighed at least 12,00 pounds, and I told him we had no use for such a safe, but I believe it was afterwards [164—73] put in there. We never paid for it, however, so far as I know.

Q. I notice here a stockholders meeting of November 10, 1906, at 10 o'clock A. M., pursuant to adjournment: "1378 shares, a majority of the stock issued, being represented. Mr. Wernse nominated as directors, Messrs. Cutting, Morgan, Wernse, Mayo and Betz. There being no further nominations the nominations were closed and the secretary was instructed to cast the ballot for said persons as directors, and said persons were declared directors of this company for the following

(Testimony of Henry B. Mayo.)

year or until their successors were elected.”

You remember being elected a director at that time, do you not?

A. I believe I was, yes. At that time money had been raised to carry on the work of the canal company. As I stated, the Monetary provided all the money for the initial expenses and the bond issue. When the stock was divided Mr. Cutting took the majority of the stock, for which he did not pay a cent, and he agreed to buy \$10,000 worth of the bonds.

The COURT.—Q. Of the treasury bonds?

A. Of the treasury bonds of the Point Richmond company, and that when that money was expended in dredging or putting the lots in shape to market and on the market, he would raise other money. The fire came very soon after this arrangement was made. Now, what amount of this \$10,000 had been spent by the company before the fire I never could learn.

Nothing had been paid in. Mr. Cutting proceeded before the fire to do certain dredging at Point Richmond; he had dredging done and paid for out of this \$10,000.

I do not know who the ten bonds were delivered to.

Mr. HART.—The bonds were \$500 each. [165—74]

The COURT.—There would be twenty bonds.

The WITNESS.—I think the bonds were always in the hands of Mr. Cutting’s employees right from

(Testimony of Henry B. Mayo.)

the start, Mr. Wernse and Mr. Betz.

One or two days after the meeting at which the minutes show Mr. Cutting's check was delivered to Mr. Wernse, I first learned about the 1175 shares being sold to Mr. Cutting or claimed to have been sold. I asked Mr. Wernse what had been done at the meeting and he said Mr. Cutting bought the 1175 shares of the Point Richmond stock that belonged to the Monetary and had given his check to the Monetary company for \$1,175, and that as the Monetary did not need the money they had immediately loaned the money to Mr. Cutting. Of course I objected to this at the time, because Mr. Cutting had agreed to carry the Monetary's interests to a final conclusion of the transaction.

The COURT.—Q. Now, for the stock he had received?

A. For the stock he had already received. These properties they admit to-day are worth \$5,000,000, probably worth a great deal more. Mr. Cutting never paid a dollar for his half interest.

* * * Mr. HART.—Q. Now, tell us what the arrangement was, who was present when it was made and what the arrangement was, as to the present and the future.

The COURT.—What arrangement are you speaking of now—the understanding that Mr. Cutting was to furnish the means to develop this property?

Mr. HART.—I want to know when it was made, by whom, and what was said and all about it.

(Testimony of Henry B. Mayo.)

* * * Who was present at the time of that arrangement with Mr. Cutting?

A. My recollection is that you were there and Mr. Cutting was [166—75] there and Mr. Wernse was there, and myself. I could not say whether Mr. Reichart and Mr. Betz were there or not. I think Mr. Morgan was there, too. It took place in the office occupied by Mr. Cutting and the Monetary.

At that particular meeting and at that particular time, Mr. Cutting said: "I will undertake to raise the money to reclaim the Point Richmond land and put it on the market and sell it."

The COURT.—Q. In consideration of what?

A. In consideration that he receive a controlling interest in the capital stock of the canal company.

At that time the stock had practically been reserved; I don't know whether it was ever issued up to that time; I don't think it was; it was all right there among the two companies, and it was reserved to be issued in any way that should be agreed upon when the final financing came; I think it remained up to that time in Mr. Reichart's name. It took about 2501 shares to give Mr. Cutting a controlling interest in it. There were 5000 shares; one-quarter was then given to Mr. Reichart and the small issues of stock that had been made were taken out of the Monetary quarter, which cut it from 1250 to 1175—the small qualifying amounts.

There were 10 shares to each director, and I think there was 150 shares Mr. Reichart sold to Mr. A. N.

(Testimony of Henry B. Mayo.)

Lewis to induce him to become connected with the company; that was Asa N. Lewis, a man connected with the Lux estate. They call him Dr. Lewis; I think he is Mrs. Lux's son-in-law, or something of that kind.

Mr. HART.—Q. Now, Mr. Mayo, before we leave the subject, I want you to express to the Court all you know about that transaction with Mr. Cutting, how much money was he to advance, [167—76] and what was said about it?

A. It was discussed often in the meetings.

Q. But I mean this particular time when you say this arrangement was made.

A. It was discussed there, what amount would be needed, but I am uncertain as to what amount would be needed. Mr. Cutting said, "I will take \$10,000 worth of bonds and when that \$10,000 is exhausted in improvements at Point Richmond, if we have not been able to sell any of the property, I will take more bonds or get my friends to take bonds; I will see that the company has money to go ahead with."

I think there was no definite amount set of bonds that he would take in addition to the \$10,000;—only sufficient funds would be raised. I don't think that was reduced to writing, but he was given the stock. I think there were estimates made at that time of what it would cost to put the land in condition; we had an engineer. He was a man by the name of Smith; I think he went over there at that time. He made a map for us. My recollection is that the estimate was left indefinite absolutely.

(Testimony of Henry B. Mayo.)

I had absolutely nothing to do with the management of the Monetary Trust Company at the time; I merely attended the meetings to protect the interests of myself and my clients. I had nothing to do with the management and cut no figure in anything that was done. I was not allowed in any of the secret councils of the company. It is hard to say what I know about secret councils; they were all in the office there together, and I noticed whenever I would come into his office there would be a hush, nothing said. My presence always caused silence.

Mr. HART.—Q. Did you have any suspicions when you found [168—77] that they were silent when you would come to their office?

The COURT.—What is the object of that?

Mr. HART.—To show he had knowledge of sufficient facts to put him on inquiry to go into these records and look them up and examine into them.

He is the agent for the plaintiff and they would be charged with whatever their agent was charged with.

The COURT.—Proceed.

Mr. WHITMORE.—I object to that line of questions on this ground, that it is immaterial because the evidence already shows that Mr. Cutting and these other officers were acting in a fiduciary relation and it is immaterial what knowledge Mr. Mayo or Mr. Woodward may have had in the premises.

The COURT.—I am not so sure as to the effect of it. I will let it go in.

(Testimony of Henry B. Mayo.)

A. I construed their silence merely to mean that they were antagonistic to me. I did not wish to interfere with the business in any way as I hoped to see it go ahead and succeed.

I knew both of the plaintiffs in this case when they were school boys, possibly 7 or 8 years old.

The COURT.—Are the plaintiffs present? I would like to get the parties identified in my mind.

Mr. WHITMORE.—No, they are both in Illinois.

The WITNESS.—(Continuing.) I have kept up the acquaintance ever since; they are my first cousins. I think I swore to the original bill of complaint in this case; I had consulted [169—78] the plaintiffs before that bill was filed.

The reason these 500 shares,—the portion that I claim they own,—have not been transferred to their names is because they desired to keep it in my name because I was here and could look out for it.

The \$5,000 that were sent out here were sent by Mr. Woodward to me, and I claim that I paid the whole of that \$5,000 into the corporation. It is not a fact that I turned over to them the shares of stock that were set apart to me as promotion stock; I had no promotion stock.

I think the total number of shares standing in my name or in their names amounts to 610 altogether.

Q. Now, as a matter of fact, that stock was really bought by you from the corporation, was it not?

A. Yes.

The COURT.—How do you mean? He is just saying he bought it for them. Do you mean physi-

(Testimony of Henry B. Mayo.)

cally bought by him, or do you mean bought for himself first?

Mr. HART.—Yes.

The WITNESS.—While I bought the stock and paid for it it was understood and within the knowledge of everybody concerned that it was Mr. Woodward's stock, that he was putting up the money.

The COURT.—Q. You were not buying it for yourself?

A. I was not buying it for myself.

Mr. HART.—Q. With whom did you have that understanding?

A. With yourself and Mr. Wernse. I don't think there was really anybody at that time taking any active part in the Monetary excepting Mr. Wernse and yourself and myself,—that is, in the very beginning.

I have already stated that 2,000 shares of stock were to be issued for promotion purposes and that 1000 shares were to [170—79] be sold at \$5 per share within a year.

It is not a fact that it was 600 shares of the promotion stock that I received that went to the plaintiffs in this case,—no part of it. There was not 2,000 shares issued for promotion. I don't know whether that is a mistake on the books, minutes, or whether the plan was changed, but as adopted there was only 1,000 shares of promotion stock issued, 500 to yourself and 500 to myself; that was afterwards cancelled. The 500 shares that went to Mr. Woodward were paid for in cash.

(Testimony of Henry B. Mayo.)

The COURT.—Q. But you say that the 1,000 shares of so-called promotion stock, that went, 500 shares to you and 500 shares to General Hart, was afterwards cancelled.

A. When Mr. Cutting came in he objected to that, and I consented that my interest in it be cancelled; that is, be returned to the treasury. While I had put in the Point Richmond proposition into the Monetary, which was the only piece of business they ever had that brought them anything that amounted to anything, yet, at the same time, Mr. Cutting was willing to allow Mr. Hart to put in 100,000 shares of El Dorado Basin Gold Dredging Company stock which we all knew at that time was absolutely worthless; General Hart was allowed to put that certificate in there at a certain figure and take out Monetary stock for it, which allowed him his promotion stock, but I was not allowed mine.

The WITNESS.—(Continuing.) Mr. Woodward sent me that \$5,000 at the time the first payment was made of \$1,000 into the Monetary; I think all my payments were in checks; I have not the checks; it was before the fire, and the checks were destroyed in the fire so that I have not got any of them. I saved absolutely no books showing the payments.

[171—80]

The books as read this morning, I know nothing about. I know that you have had since the fire a ledger which showed a credit to my account of over \$4,500; what you have done with the ledger, I don't

(Testimony of Henry B. Mayo.)

know. I have seen it since the fire. As a matter of fact, it should have been \$6,000 instead of \$4,500, but the books show I have paid in over \$4,500.

[172—81]

**[Testimony of H. Wernse, for Plaintiffs
(Recalled).]**

H. WERNSE, being recalled, testified as follows:

Mr. HART.—Q. Mr. Mayo says that you had a ledger of these accounts including his own, that he examined and looked into since the fire. Is that correct?

A. I don't remember seeing a ledger since the fire.

The COURT.—Q. How would the ledger be destroyed and none of the other books be destroyed?

A. The ledger might have been out; they might have been at work on it.

Q. It is not a question of what might have been. I am talking about why a ledger, as valuable an adjunct to a set of books as a ledger, would be left out and the others all put in the safe?

A. The ledger is not as valuable a book as this cash-book and journal; they are the two most valuable books.

Q. You and I need not discuss that. I am asking you why it would be that a ledger would be left out and every other book put in the safe?

A. I don't know why it should be left out; I don't know.

Q. Is it a fact or not that the ledger existed until since the fire?

(Testimony of H. Wernse.)

A. I don't remember the ledger since the fire.

Q. You don't say it did not exist?

A. I don't say it did not exist; it may have existed. Mr. Mayo saw it. I did not see it, to my knowledge. If I did, it would be here.

Q. If it is in existence I would like to have it produced.

A. We can take these and post these up right away and show the ledger entries.

Q. It may not show the proper amount.

A. The ledger entries would not be made except from them. [173—82]

Cross-examination of H. B. MAYO resumed:

The WITNESS.—The ledger was written up to a certain extent as a book of original entry. There were a part of the entries in the ledger that do not appear in any other book. I don't remember the first time I saw that ledger, but I can remember seeing it since the fire because it was a large book like the others. I remember objecting to Mr. Wernse that my account showed a credit of only about \$4,600, when as a matter of fact it should have been \$6,000. That is all I know about it. The last time I saw it was since the fire. I think it was in Mr. Cutting's present office in the Monadnock Building, my recollection is. I could not be positive as to where I saw the book. I might be mistaken. I am referring to the ledger of the Monetary Trust Company.

Mr. HART.—I don't know anything about it. I have never seen it myself.

(Testimony of H. Wernse.)

The WITNESS.—(Continuing.) Mr. Cutting became the president of the Monetary Trust Company before the arrangements with Mr. Reichart were consummated.

Mr. WHITMORE.—The plaintiffs rest, if your Honor please.

[Testimony of Fred Reichart, for Defendants.]

FRED REICHART, called for the defendants and duly sworn, testified as follows:

I am the gentleman *who* name has been mentioned here by the witnesses as Fred Reichart. I reside at the present time at 1139 Leavenworth Street, San Francisco. My business is real estate and promoting. I have been engaged in that business about twenty-five years, and in San Francisco since 1891. I know the location of the present city of Richmond. I knew Mr. [174—83] Mintzer in his lifetime, and Mrs. Tuxberry. I had known them three years before the spring of 1904. I did their real estate business. They were owners of most all that land at Point Richmond. They were owners of a large amount of land, most all that land at Point Richmond. I remember about this property which afterwards became the property of the canal company that is called the Point Richmond Canal & Land Company. There were about 400 acres in that tract. It is what they call south of the tunnel at Point Richmond. The character of the land is overflow, marsh. I have done a great deal of business in Richmond.

(Testimony of Fred Reichart.)

The WITNESS.—(Continuing.) Mr. Mintzer was Mrs. Tuxberry's son-in-law. I had something to do with securing a contract on this property from Mr. Mintzer. That was about the 30th of June, 1904. No one else was interested with me in that contract. Mr. Mayo never had any interest in my contract. The contract was in writing. It was between Mr. Mintzer and me. I have not a copy of that contract; it was burned up in the big fire; I have no copy at all. I could not tell you whether the Mintzer people retained a copy of it that was not burned.

Q. What were the terms of the contract—I will ask you first if you can state in substance the terms of the contract?

Mr. HART.—Q. Were there two copies or only one?

A. It came in the shape of a letter, you see. It was mailed from Mr. Mintzer to me. I had been trying to get the thing in writing, and of course that covered several topics, but the thing had not been at this time thoroughly investigated by Mr. Tuxberry, and Mr. Mintzer put me off from time to time on that account, and my last word with him was when he got ready to put that in writing.

Mr. HART.—You saw the contract was finally signed?

A. Oh, yes, and sent to me by mail. I don't think there was more than one copy, because it was the same as a letter. I [175—84-85-86] don't know whether he kept a copy of his letter or not.

(Testimony of Fred Reichart.)

My copy of the letter was burned up in the fire of 1906. The Point Richmond Canal & Land Company was organized, I think, on July 14, 1904.

Mr. Hart here referred to the By-Law Book of the Point Richmond Canal & Land Company and stated that it showed that the by-laws were signed on the 14th day of July, 1904, by Frederick Reichart, A. N. Lewis, H. B. Mayo, H. W. Wernse and H. C. Cutting, as directors; also that the stockholders and the directors were the same 5 persons.

Whereupon said by-laws were admitted and considered to be in evidence for whatever purpose they might be worth.

The WITNESS.—(Continuing.) I have none of the letters that fix the terms of the transaction between the Tuxberrys and the Point Richmond Canal & Land Company. I don't know whether Mr. Mintzer retained copies or not. Mr. Mintzer is dead and Mrs. Tuxberry is dead, too.

Mr. HART.—Q. How much was to be paid for the property, Mr. Reichart?

A. Well, it was to be paid in the way of \$400,000 in bonds. I had an agreement with Mr. Mintzer that I was to receive—

The WITNESS.—(Continuing.) This agreement that I have in mind now, a part would be in writing and a part would not. The property was deeded to the canal company, upon delivery of the bonds, and I think on the 12th of September, 1904, there were altogether 800 bonds.

(Testimony of Fred Reichart.)

Q. Of \$500. each?

A. There was to be left as a separate trust \$67,000 in bonds, called construction bonds. The rest were delivered to Mr. Mintzer. There was no money whatever paid to the Tuxberrys by the Monetary Trust Company on account of this purchase. [176—87-88-89]

The stock certificate book of the Point Richmond Canal and Land Company was then received and considered read in evidence without objection.

Q. Well, now, what I want to know is can you state to whom the original stock was issued by the company without examination of the books?

A. Yes.

Q. To whom?

A. In the first place 1175 shares to the Monetary Trust Company. 200 to Dr. Lewis—250 rather; 50 to the board of directors, 2350 and 1175 to me; that is the way the books show, I believe. [177—90]

Mr. HART.—I notice here that the 1175 shares issued to the Monetary Trust Company was dated the 30th of March, 1905, and that is the first issue; that the total original stock according to this was issued on September 12, 1904, by the Point Richmond Canal & Land Company, and the transfer to the Monetary Trust Company was made on March 30th, 1905.

The COURT.—The witness is mistaken. He said that the first issue was 1175 shares—you are mistaken in saying that was a part of the first issue?

(Testimony of Fred Reichart.)

A. Yes.

Mr. HART.—I would like to call the Court's attention to the fact that the entire stock outside of the directors' stock was issued to Mr. Reichart.

The COURT.—He has testified so.

Mr. HART.—Except as to the 1175 shares.

The COURT.—Yes.

Mr. HART.—That is what I want to correct.
[178—91]

Now, Mr. Reichart, you became a director in the Monetary Trust Company one time?

A. Yes. The reason I became a director in that company was, I was requested by Mr. Wernse originally to join the Monetary Trust and help boost the thing along. The way the 1175 shares came to be issued to the Monetary Trust Company, was upon a verbal agreement that they were to finance the Point Richmond Canal & Land Company, pay all bills of incorporation and issuing or getting up of the bonds and general development upon the ground, dredging and so forth, and at the same time they were to sell the construction bonds or as much as could be sold for the further development of the canal property. That was the understanding.

The COURT.—Q. Why were they to sell construction bonds if they were to furnish all the payments for the development of the land?

A. Because construction bonds would not sell until some start had been made and money expended upon

(Testimony of Fred Reichart.)

the property, which was continually most always under water.

Q. You must intend to modify your statement that they were to furnish all the money to develop that land.

A. Here is the verbal part of it, that had been talked of from time to time—that from eight to ten thousand dollars of the company's money should be put into the treasury in order to make these developments, dredging and so forth.

Mr. HART.—Q. Was there any estimates made of the amount required?

A. Well, I have always held out from eight to ten thousand dollars. The Monetary Trust Company did not furnish any money that I have ever seen, outside of paying for the incorporation and the expenses of printing the bonds; I suppose that bill has been paid. [179—92]

Q. How much did the Monetary Trust Company expend for the canal company?

Mr. WHITMORE.—I think the books of the company are the best evidence of this.

The COURT.—Yes.

Mr. HART.—Q. I will ask you: You were president of the Point Richmond Canal & Land Company during the time of the organization and the issuance and the delivery of the bonds, were you not?

A. Yes.

Q. I will ask you, during that time, what moneys, if any, were paid to your company or on account of your company by the Monetary Trust Company?

(Testimony of Fred Reichart.)

Mr. WHITMORE.—I object to the question on the ground it is not the best evidence.

The COURT.—The objection is sustained. [180—93—94]

[Testimony of H. C. Cutting, for Defendants (Recalled)].

H. C. CUTTING, being recalled for the defendant, testified as follows:

I am one of the defendants in this case.

There was neither a written nor verbal agreement between me and the Monetary Trust Company as to what I was to do or not to do.

The COURT.—There was no understanding at all?

A. As to what I should do for the Monetary Trust Company?

Q. Yes.

A. Not at all. They just came after me to buy some of their stock.

Q. And they made you president?

A. That was afterwards.

Q. You are the president of the Monetary Trust Company, and he is asking you if you had any contract with them. His question relates to the whole period.

A. I had no contract with them.

I was present as one of the organizers of the Point Richmond Canal & Land Company and I got 10 shares for that.

The WITNESS.—(Continuing.) Then as an interested member of the Monetary Trust Company I

(Testimony of H. C. Cutting.)

tried with Mr. Wernse as hard as I could to sell some of these bonds to develop the company, develop the land—some 60,000 odd dollars' worth of bonds that were left with the Central Trust Company for development purposes,—for the benefit of the canal company.

I bought some of those bonds from the Central Trust Company under a contract with Mr. Reichart.

(Here the following agreement was read in evidence without objection, and marked Plaintiff's Exhibit "A.") [181—94½]

Mr. HART.—(Reading:) "This agreement made this 3d day of May, 1905, by and between Fred Reichart of the city of San Francisco, State of California, as the party of the first part, and H. C. Cutting of the same place, as the party of the second part, Witnesseth: That said party of the first part is the owner of 2350 shares of the stock of the company known as the Point Richmond Canal & Land Company, which he agrees to assign and deliver to said party of the second part provided the said party of the second part has by the 1st day of October, 1905, purchased 27 bonds of the aforesaid company, and in trust with the Central Trust Company of San Francisco for the sum of \$10,125, as time hereof is the very essence of this agreement."

"In Witness Whereof, the said parties hereto have set their hands and seals the day and year first above written. Fred Reichart and H. C. Cutting."
"Seal."

(Testimony of H. C. Cutting.)

The WITNESS.—(Continuing.) I finally took up these bonds mentioned in that contract or paper, Defendant's Exhibit "A." The money was paid into the Central Trust Company for the benefit of the Point Richmond Canal & Land Company. The Monetary Trust Company had nothing to do with it; they had failed on that contract.

The COURT.—Q. What contract do you refer to?

A. Well, they had some kind of an agreement that they were to sell these promotion bonds, and we tried to sell. I know I tried to get one or two parties and spoke to Mr. Wernse about one or two parties who might be interested in them, but they never succeeded in selling any; never succeeded in getting any money for development. [182—95—96—97]

I entered into no agreement whatever with the Monetary Trust Company for any bonds. How I came to have any dealings with the Monetary Trust Company in reference to the 1175 shares, I put in this \$10,125 into the Point Richmond Canal & Land Company. The money was expended on the land in dredging, and I was the only person that had put a cent into it. That was completed in October, 1905. Then in January, 1906, I went East and spent quite a bit of time in Boston, where I was acquainted, with one or two parties, and I tried there to raise some money to put into this proposition, but I could not do it. I returned here in March, 1906. I was in Tonopah at the time of the fire; in fact, up to that time most all of my time was spent in Tonopah; and then about July, 1906, I brought my family down here from Tonopah.

(Testimony of H. C. Cutting.)

The COURT.—Leave out all that detail and come down to the facts.

A. Well, then, the proposition came up as to doing something over at Richmond. I went after Mr. Reichart because he owned 1175 shares. He said he could not do anything with it. I tried to get Dr. Lewis to buy the stock of the Monetary, but I could not do that. I took Mr. Morgan over there and tried to get him interested in it and I could not do that. I was stuck with \$10,125 in there, so I told Mr. Reichart, "Well, here is the interest accumulating on these bonds and this thing will be wiped out in a little while, and we have got to do something." So after quite a bit of talk Mr. Reichart said—I told him that I would take what I had in it for mine and give him the stock. But he could not do anything with it. I made the same proposition to the Monetary Trust Company; they did not want it; they had no money. So I simply told Mr. Reichart and Mr. Lewis, "Well, if you are not going to do anything, I am [183—98] holding a bag; I want you to sell me your stock; if I have got to put this thing through, I want the stock."

The COURT.—What stock?

A. Of the Point Richmond Canal & Land Company.

Q. You had too much of it then, didn't you?

A. The other interests that held the stock would not do a thing, I should not carry them. I had about \$10,125.

Q. But you had gotten bonds for that; you were buying bonds?

(Testimony of H. C. Cutting.)

A. I would not have bought the bonds. I bought the bonds because I got the stock.

Q. Well, but I am trying to get at what call you had upon the Monetary Trust Company because you had taken under a contract with Reichart \$10,000 of the bonds of the canal company and that money had gone into the development of the land?

A. Why, I had no call on them.

Q. You were just now stating that you told them you were holding the bag and if they would not fish you would cut the bait?

A. That is it, exactly.

Q. I do not see the connection.

A. I will explain it to you. I did not have the control of the company. I had 2,350 shares. Dr. Lewis had 250 shares. Mr. Reichart had 1175 shares. The Monetary Trust Company had 1175 shares. Now, I did not care to buy any more of the bonds; I did not want the bonds; I could not sell the bonds. The proposition was of doing something, and in order to do something somebody had to put up some money. My proposition was, "Well, we will assess the stock." No, nobody wanted an assessment of the stock. There is no proposition in the minutes showing a motion to assess the stock, but it was talked of at the time, and Mr. Reichart did not have any money to put up, and his proposition was to sell me his stock at \$1.00 a share. Then I went for Dr. Lewis—no, he didn't want to [184—99] put any money into it, so I said, "Well, then, sell me your stock at \$1.00 a share." Then I took the matter up with the Mone-

(Testimony of H. C. Cutting.)

tary Trust Company, and I took the proposition up with Reichart to sell me his stock for \$1.00 a share. I bought the stock, his and Dr. Lewis's stock at \$1.00 a share, and then I wanted the Monetary Trust Company either to pay for their share of the development or sell their stock at \$1.00 a share. They would not stand for an assessment to put into this thing, so I made the same proposition to them, "Well, sell me the stock for \$1.00 a share," which they agreed to do rather than be assessed. Here is the agreement that I had with Mr. Reichart to buy his stock at \$1.00 a share and here is the agreement that I had with Dr. Lewis to buy his stock at \$1.00 a share.

Mr. HART.—Q. Is this the paper that you speak of as having an option to purchase Mr. Reichart's stock at \$1.00 a share?

A. Yes, there is an option on Mr. Reichart's 1175 shares of stock at \$1.00 a share.

Mr. HART.—We offer this in evidence. We ask to have it marked Defendant's Exhibit "B" and that it be considered read so as to save time.

The COURT.—Yes.

Mr. HART.—Q. Did you avail yourself of the option and take the stock? A. I did.

Mr. HART.—Q. I will show you this paper. Is this one you received from Dr. Lewis?

A. That is the option I received from Dr. Lewis to buy his 250 shares at \$1.00 a share.

Mr. HART.—We offer it in evidence. It is dated November 6th.

The COURT.—Let it go in. [185—100—101]

(Testimony of H. C. Cutting.)

Mr. HART.—I ask that it be marked Defendant's Exhibit "C."

Q. To what extent did you try to sell additional bonds of the canal company? If you did not try, say so.

A. I tried. I did not solicit very much myself but I would suggest to Mr. Wernse someone that might buy these bonds. I tried very hard to get Dr. Lewis to come in, but, of course, the proposition never was for me to come and buy bonds of the company; the proposition was for me to come in and buy the other half of the stock.

Mr. HART.—Q. What I want to get at, Mr. Cutting, is, you spoke a few minutes ago in relation to an assessment. Why was it an assessment would have to be levied or why was it talked of when there were bonds for sale for developing the property?

A. You could not sell bonds.

Q. That is what I want to know. Now, to what extent?

A. I tried to get George Wingfield to come in and buy the other part of that stock, that is, the Monetary stock and the Reichart stock. I was not foolish enough to ask anybody to buy the bonds if they did not own any of the stock because they were of no account.

Mr. HART.—Q. Do you know that this land or property was included in the mortgage that secured these bonds?

A. Yes; that mortgage was dated, I think, sometime in the fall of 1904. [186—102]

(Testimony of H. C. Cutting.)

The WITNESS.—I took this matter up that I have spoken of in relation to the canal company about the spring of 1907. I made investigation as to the prices of real estate at Richmond and in the vicinity of this land, and of land of the same character—the Ellis land—I bought one-third of the Ellis estate. I have been acquainted with the selling price of land in Richmond since 1907.

The COURT.—He has not shown qualifications that would have any effect on me at all.

(An adjournment was here taken until Friday, November 20, 1914, at 10 A. M.)

Friday, November 20th, 1914.

Direct Examination of H. C. CUTTING resumed:

A. I made a trip over there and went around and I talked to the Bank of Richmond on the point, and there was Mr. Lucas had a real estate office over on the East Side; I talked with several real estate men regarding it. My object was to investigate the question of the value of this particular tract of land. I inquired as to what these gentlemen thought about it and I made inquiries as to the prices of adjoining land. I think I was over there two or three times, at different times. I was over there a good many times examining the land, as to whether it was feasible to do the things which we proposed to do. [187—103—104]

Mr. HART.—Describe it (the character of the land) to the Court.

A. Well, it was overflow land; it was bare; most of it was bare at low tide, but had rivulets and sloughs

(Testimony of H. C. Cutting.)

through it,—good deal like this marsh over here at the Estuary. It had a better foundation than most of that; salt marsh and tide land, as it was testified to yesterday here. We examined it very carefully. We bored down there to see what was down there, to see whether it could be dredged, and see what foundations there were, if it were prepared for use.

Q. Now, at that time did you form any idea from what you saw and what you learned from valuations generally, as to the reasonable value of this property?

A. Well, the property had no real market value unless certain things were done to it. At that time I was aware that there was a mortgage on the property given to secure \$400,000 of bonds, and I was also aware that about \$336,000 of bonds had been turned over to the former owners of the property. The other \$64,000 of the bonds at that time were in the Central Trust Company, in trust for the Point Richmond Canal & Land Company. They were the trustees under the mortgage.

Q. Now, then, what was the reasonable value of the shares of stock of the Point Richmond Canal & Land Company at that time and just previous to and at the time that you purchased these shares?

A. Well, the stock of the company had no value at all unless there was a lot of money spent on the property.

Mr. HART.—Q. Did you make estimates of the amount of money that would have to be spent on the property in order to make it of a value greater than

(Testimony of H. C. Cutting.)

the bonded indebtedness? [188—105—106]

A. Yes. I made such investigation for some time before I purchased the stock. When I say some time, I mean it covered the space of time during the investigation. For the purpose of making the property in a condition that would enhance the value of it at all above the bonded indebtedness, there would have to be a channel dug in there so that shipping could come in and then the property had to be filled so that it would be above the high water line; and of course it would ultimately have to be filled to the city grade, whatever the grade was established by the city. The grade or what is known as the base line had not been adopted at that time. Richmond was not incorporated at that time.

The WITNESS.—(Continuing.) I made an estimate of the expense of the making of this channel. I went over there a good many times, and figured on it—a lot of times—how to handle it, before I purchased the stock. I don't think I have ever figured it up exactly, the amount of money that has been spent on this property, but I should think in the neighborhood of \$150,000. I spent the money. The improvements that have been placed upon the property for this expenditure have been a canal cut for a distance of about 3,000 feet. There has been pretty near 100 acres filled in and one street 110 feet wide has been graded for 4,000 feet across the property and the sewers have been put in on some of the streets, and Richmond Avenue on one side of the property has been macadamized up in very nice shape, and then

(Testimony of H. C. Cutting.)

there have been some buildings—there have been two canals built, two side canals. It is a hard matter to estimate the present value of the property, I should think it is worth a million dollars. There has been a good deal of this 100 acres contracted for in lots. The books of the Point Richmond show the sales that have been made. No dividend has ever been paid upon the stock. There is still a bond issue out that is due the 1st of January, 1915. I think about [189—107—108] \$40,000 worth of bonds altogether have been paid and cancelled. The remainder are unpaid. They are due the 1st of January, 1915.

(A recess was here taken until 2 P. M.) [190—109]

[Testimony of George S. Wall, for Defendants.]

AFTERNOON SESSION.

GEORGE S. WALL, being called for the defendants and duly sworn, testified as follows:

Direct Examination.

I reside in Oakland; my business is real estate; I have been engaged in that business about 13 years at Richmond, Contra Costa County.

I am very familiar with the land called the Cutting land or the canal subdivision. I knew it some time before Mr. Cutting had anything to do with it. I would say it was marsh land, mostly.

I remember the time that Mr. Cutting took hold of that land. I have been actively engaged in the buying and selling of lands in Richmond during these 13 years. I am very familiar with the prices and have

(Testimony of George S. Wall.)

been at the different periods of time. I should say that the particular tract of land known as the canal subdivision including the whole 406 acres, in January, 1905, should have been worth from \$350 to \$400 an acre. The market value could not have increased in September, October and November of 1906 very much that I can see.

I am familiar with the improvements that have been made so far on about a hundred acres of the land.

The reasonable value of the land at the present time, taking the land on which the improvements exist and the portion that is not improved, compared with other lands that have been sold on higher levels, I would say was not over \$1,200 to \$1,500 an acre.
[191—110]

Mr. HART.—Q. What would you say was the value of the land, the reasonable value of the land at the time of the filing of the original bill in this case, on the 19th of February, 1913?

A. I don't think there has been much change in values during that time.

Q. Considering that this particular land, we will say, belonged to the Point Richmond Canal & Land Company, and on which that company had executed a mortgage and given bonds to the par value of \$400,000, to run 10 years from the 1st of January, 1905, and becoming due on January 2d, 1915, and drawing interest at 6%, what would you say that that land was worth, if anything, in excess of the bonds, in the fall of 1906?

(Testimony of George S. Wall.)

Mr. WHITMORE.—I object to the question first on the ground that it assumes that the bonds were issued for \$400,000, and that it appears that the company had 67,000 of these bonds—

Mr. HART.—66,000.

Mr. WHITMORE.—\$66,000 of those bonds, or 132 bonds, and that the mortgage indebtedness actually existing as against the company was only \$333,000 or \$334,000.

The COURT.—The objection is sustained.

Mr. HART.—Q. I will ask you now: Supposing that there was issued upon that mortgage \$336,000 of bonds instead of \$400,000, then what would you say was the value of the property over and above the mortgage in the fall of 1906?

A. I don't think it had any value at that time.

Mr. HART.—Q. You know of several corporations that have been dealing in lands in Richmond during these 15 years?

A. Yes. I have had one or two of my own.

Q. Taking into consideration that this land had been deeded to the Point Richmond Canal & Land Company, and that it was [192—111] subject to that incumbrance of \$336,000 in the fall of 1906 of bonds maturing January 2, 1915, and drawing 6% interest, what would you say would be the value of those shares at that time, considering the incumbrance?

Mr. WHITMORE.—I object to the questions upon the ground that it does not appear that this witness is competent to answer as to the shares of stock,—im-

(Testimony of George S. Wall.)

material and incompetent.

The COURT.—The objection is sustained.

Mr. HART.—Exception.

The WITNESS.—I am not familiar with any sales of the stock in these land corporations at Richmond.

The value of the stock would depend entirely upon the question of the profits that would be made—absolutely.

Upon cross-examination, the witness testified as follows:

I don't know the exact date when these improvements were put upon this property. I do not know how much was expended to improve the property, or how much of the property has been reclaimed, as it were.

In my answers I did not take into consideration any of the improvements at all.

Mr. WHITMORE.—Q. Then your answers to those questions are based on the condition that the land was in 10 years ago regardless of improvements?

A. I cannot say that it was entirely. The first valuation was. I don't know the amount of money that has been expended nor the amount of land that has been reclaimed or filled, or the added value of that work upon the property. I am not familiar with it. The city of Richmond has not done any filling upon this land, that I know of. I don't know; I am not familiar with that. I am not interested in this land.
[193—112] I am not interested in business in any

(Testimony of George S. Wall.)

way with Mr. Cutting. I am a friend of his. I came here at his request.

The way I base values of the land,—I would place it at the valuation marked on the lots unsold, less commissions and expenses, marked by the company.

Q. Have you been testifying from the manner in which the company has marked their land for sale?

A. It is of no value until it is sold.

Mr. WHITMORE.—Q. Supposing they sold less than 20% of the land for \$40,000 in the spring of 1907, would that make any difference in your estimate of the value of the land?

A. It would depend upon the parts of it sold; some of it is more valuable than other parts.

I presume this land is valuable because of its proximity to the deep water; but there is no deep water adjacent to it at the present time. There is a canal partly dug in it—said to be a ship canal, but it is not very deep at the present time—not for very large ships.

On redirect examination the witness testified as follows:

I don't know how wide it is. I should say 80 feet, guessing at it. The portion that was improved is the 100 acres which lies next to the tracks of the Santa Fe Railroad. [194—113] I certainly would consider that 100 acres proportionately of greater value than the other 300 acres.

I have been over that 100-acre tract off and on for the last 10 years. I know where Ashland Avenue is; that is the northern boundary of the property. They

(Testimony of George S. Wall.)

have been filling in that portion of the property to make it saleable.

In my last valuation of \$1,200 to \$1,500 an acre, I considered the whole tract as one tract.

Direct examination of H. C. CUTTING, resumed:

Mr. HART.—Q. State whether or not, before we go into another subject, provision has been made for the payment of these bonds when they come due the 2d of January, 1915?

Mr. WHITMORE.—I object to that as immaterial and irrelevant.

The COURT.—The objection is sustained.

Mr. HART.—An exception.

The WITNESS.—(Continuing.) I spent something over \$50,000 upon this property before I commenced offering any of it for sale.

I think I saw both of the Woodwards once, the complainants in this case.

Mr. HART.—Q. I now call your attention to page 32 of the minute-book which has been, I believe, read in evidence, in which minutes the following appears:

“Mr. Wernse of the executive committee, being the only member of said committee present, offered for *ratification approval*, the following option given to H. C. Cutting; and upon motion of Mr. Wernse, seconded by Mr. Betz, was approved [195—114] by the following votes: H. W. Wernse, representing 505 shares; W. J. Morgan, representing 65 shares; Albert Betz, representing 55 shares; H. C. Cutting (H. W. Wernse, proxy) 753 shares; being more than a majority of the shares issued.

(Testimony of George S. Wall.)

On motion of H. W. Wernse and seconded by Albert Betz, all actions of the board of directors and its officers since the last stockholders' meeting, to date hereof, were unanimously ratified, approved and confirmed."

Do you at this time remember about that option?

A. Yes. It was written on a piece of legal-cap, that is, typewritten. The option was not signed by me. I don't know whether it was signed by Mr. Wernse or Mr. Betz or Mr. Morgan. I don't remember. I could not find my copy of that document. This option was given to me. The occasion for making the option originally was that there was nothing doing with the Monetary Trust Company; it had not done anything; we could not do any business; we could not get any money. I had put up \$10,000 for the Point Richmond Canal & Land Company, \$10,125. I was the only one who had put any money into it, and when I came down from Tonopah, about July, I talked the matter over with Mr. Reichart and saw Dr. Lewis several times, and I saw Mr. Mayo and talked to him, and there was no chance of getting any money into the proposition; so I told these gentlemen, "If you do not want to do anything"—I told him, "Well, I have got \$10,000 in here, and I have got to either put more in and carry the thing through or I have got to lose what I have got in, or a good part of it, and it might as well be lost, because it would take us a long time to get anything out of these bonds; so Mr. Reichart said he had no money to go ahead with, and I told Mr. Reichart that I would sell him [196—

(Testimony of George S. Wall.)

115] all of my bonds.

Mr. HART.—Q. What was the result of this option, Mr. Cutting? What was done?

A. Well, I offered *a* give or take proposition to every stockholder of the Point Richmond Canal & Land Company, if they would give me my money. They gave me an option to purchase it.

Q. Who did? “They” is very indefinite. Who did?

A. The directors at that meeting on November 10th, 1906—

Q. (Interrupting.) There does not seem to be any option there. What was the option?

A. They gave me a written option to purchase the 1175 shares.

Q. “They” gave you. That is indefinite. I want to know who you got that option from, and if it was by the corporation or by individual members outside of the meeting.

A. It was passed at that meeting that is reported in that book, this option was passed at that meeting.

The COURT.—“That meeting”—These minutes simply purport to ratify an option previously given, That does not purport to give you an option at all.

A. I think your Honor is mistaken about the meeting of November 10th.

Mr. HART.—Q. These minutes, Mr. Cutting, of November 10, 1906, state that “Mr. Wernse of the executive committee, being the only member of said committee present, offered for ratification and approval the following option given to H. C. Cutting.”

(Testimony of George S. Wall.)

The COURT.—You see that relates to an option purporting to have been executed before, and that is what he is asking you, who executed that option,—how did you come to get it? [197—116]

A. General Hart drew the option and I think it was signed by the General and Mr. Wernse as the majority of the executive committee.

Q. What executive committee are you talking about? A. Of the Monetary Trust Company.

Q. Is there anything in the minutes about an executive committee? [198—117]

The WITNESS.—They gave me an option to purchase it at the same price that I purchased the rest of the stock or had options to purchase the rest of the stock, because they did not want the company assessed.

Mr. WHITMORE.—I object to the contents of what it was until they produce the original, as the best evidence.

The COURT.—Yes, the original must be produced or accounted for.

Mr. HART.—Q. When did you see that option last—that is, the document I will call for?

A. There was a copy of the option in that book within the last 15 months. I do not know what became of it. The last I saw of it, I took it up to your office to show it to you, and then it was in the book when it was brought back because I showed it to Mr. Wernse. I don't remember whether that option was formulated in more than one copy. I had a copy and I saw that one in the book. I could not say whether

(Testimony of George S. Wall.)

it was my copy of the option that was in the book or whether it was another copy of the option. I do not know whether there was one copy made, or one original and a copy or more than one original. You made up the option.

Q. Well, now, I notice here on the minute-book, page 33, the following minutes: "Meeting of the directors of the Monetary Trust Company, called this 20th day of December, 1906, at 12 o'clock noon, present: H. C. Cutting, W. J. Morgan, H. W. Wernse.

Absent: Albert Betz, H. B. Mayo.

On motion of H. W. Wernse and seconded by W. J. Morgan and carried unanimously: H. C. Cutting was elected president; [199—118] W. J. Morgan, vice-president; Albert Betz, secretary; H. W. Wernse, cashier and trust officer.

Mr. H. W. Wernse presented the check of H. C. Cutting for \$1,175, stating that Mr. Cutting desired to exercise his right under the option given him by the Monetary Trust Company, ratified and confirmed by the stockholders at their last meeting, to purchase 1175 shares of Point Richmond Canal & Land Company stock held by the Monetary Trust Company at \$1.00 per share.

On motion of W. J. Morgan (under the advice of the chief counsel), and carried unanimously, the cashier was ordered to deliver to H. C. Cutting the certificate for 1175 shares of Point Richmond Canal & Land Company stock for \$1,175 as per the option.

(Testimony of George S. Wall.)

There being no further business, the meeting adjourned.

Albert, Betz, Secretary."

I will ask you to state to the Court if that meeting was held at the time specified in this minute-book.

A. That meeting was held at that time. I was there. I don't know anything personally in reference to notice having been given to the others—not of my own knowledge. I gave my check for \$1,175—\$1.00 a share for 1175 shares. [200—119]

The WITNESS.—I spent most of the night, last night, looking for it. I could not find it. I went through everything over at my house, all the papers that I could think of. In 1906, I had my place of business out at 925 Golden Gate Avenue, in a room next to your office. (Mr. Hart's.) No, at this time I had a desk in your office at 925 Golden Gate Avenue.

I spent the majority of my time in Tonopah up to the spring of 1907.

I have requested Mr. Wernse and Mr. Betz to find this option.

Q. What report did they make to you, if anything, on that subject?

Mr. WHITMORE.—I object to that as immaterial and irrelevant.

The COURT.—The objection is sustained to your inquiry.

Q. I will ask you now whether you gave a check for this as stated *herein* the minutes. A. I did.

The WITNESS.—(Continuing.) I do not remember what bank it was on; I did business with the State

(Testimony of George S. Wall.)

Bank & Trust Company and the Ormsby County Bank in Tonopah—I don't know whether I was doing business with the Wells, Fargo Nevada National, the First National, or the American National down here.

Q. I am speaking now of the month of December, 1906.

A. I could not recall. I have examined to see if I can find that check. I have tried to find it. I have not been able to find it; I could not find any checks or check-books that were used before we moved down to the Monadnock Building, where I now am; at that time I bought a new desk and some filing cabinets and had places to put things but up to that time I only had a desk out in your office and I had [201—120] no place to put them; to take care of them. I have no checks at all previous to the time that I established my offices in the Monadnock Building. I don't think I have a check previous to that time.

“What have you got to say about the question whether this check was ever paid or not?”

The COURT.—He wants to ask you if you know whether the check was ever paid or not.

A. I don't know whether the check was paid or not. I drew hundreds of checks at that time. I never followed them up to see whether they were paid or not.

I don't have my checks returned unpaid. I don't draw a check unless there are funds in the bank to pay it.

Mr. WHITMORE.—I ask that that be stricken out.

(Testimony of George S. Wall.)

The COURT.—Let it go out. Answer the question.

Mr. HART.—Q. Did you have money in the bank on which the check was drawn sufficient to meet it?

A. I certainly did.

I never had any office at 79 New Montgomery Street, at the Crossley Building. The Monetary Trust Company had an office there. After I was president of it, there was a little desk in the back office. I was there very little. I was up at Tonopah most of the time during these times.

Q. State whether or not you had any conversation with Mr. Mayo in reference to the transaction of putting up money for financing the Point Richmond Canal & Land Company? [202—121—122—123]

A. Do you mean before or after the fire?

The COURT.—He means at all.

A. I had a talk with him after the fire, but before the fire I never told him that I would finance the company or anything of the kind. The proposition of financing the Monetary Trust Company was that Mayo and I were to put up the money to pay the expenses of the Monetary Trust Company, and if some business were found that would justify it, we were to pay in the balance of the subscription for 500 shares of stock apiece. That is the only conversation that I ever had regarding it. I never had any talk with Mr. Mayo at all in reference to the purchase of the bonds of the Point Richmond Canal

(Testimony of George S. Wall.)

& Land Company. Mr. Mayo did not have anything to do with the bonds of the Point Richmond Canal & Land Company after the Monetary Trust Company had failed to sell these bonds.

I purchased the first 27 bonds between May and October, 1905.

Q. I notice that this contract of Mr. Richarts that you spoke of being Defendant's Exhibit "B," is dated the 29th of August, 1905. Had you bought any bonds previous to that time?

A. Yes; I bought the \$10,125 worth of bonds; that is, 27 bonds, at 75 cents on the dollar—I bought those bonds between May and October, 1905. The money was expended in taking out the first cut in that canal.

Q. That, then, was the same 27 bonds that was mentioned in Exhibit "A" under the instrument dated the 3d of May, 1905?

A. That was the contract under which I purchased the bonds. The Monetary Trust Company had nothing to do with it. [203—124—125]

Mr. HART.—Q. Now, Mr. Cutting, what business did you do, if any, in the office at 79 New Montgomery Street?

A. I did not do any business except as called upon by the Monetary Trust Company.

Q. Did you have a desk there?

A. Yes, there was a desk in the back room. It belonged to the Monetary Trust Company. After the fire the Monetary Trust Company moved its

(Testimony of George S. Wall.)

offices up to 925 Golden Gate Avenue. That company did not have any furniture there. I think the furniture was your furniture that was there. I do not believe there was anything that belonged to the Monetary there. I don't think the Monetary Trust Company paid any rent after the fire; I think they paid Mr. Wernse his salary up until probably all of 1906—I don't know—they paid him some salary.

The Monetary Trust Company keeps its books at my office at 779 and adjoining rooms in the Monadnock Building.

Mr. HART.—Q. Were there any charges made against that company for office rent since the fire of April 18th, 1906?

A. Not that I know of. I did not come down here until sometime in July, 1906.

The Monetary Trust Company has not bought any furniture or furnished any furniture at the Monadnock Building for me; I don't know of any they have bought.

I am admitted to the bar as a lawyer; have taught school in Nevada, and was State Superintendent of Public Instruction for four years. [204—126]

[Testimony of H. W. Wernse, for Defendants
(Recalled).]

H. W. WERNSE, being recalled as a witness for the defendants, testified as follows:

I am the gentleman that has been mentioned here in these minutes as "H. W. Wernse."

(Testimony of George S. Wall.)

I do not know where that option paper is. I last saw it some time after this suit was started. It was in the minute-book lying loose. These minute-books were examined by Mr. Cutting and Mr. Mayo and Mr. Clayburg, Mr. Whitmore and yourself (referring to Mr. Hart). I do not know where that option is now. I did not take it out of the books. I only saw one copy. I never saw more than one copy. That was the one I signed. Yourself and myself signed that option.

Mr. HART.—Q. Who composed that executive committee?

Mr. WHITMORE.—I object to that as immaterial and irrelevant [205—127] and not the best evidence of who composed the executive committee.

The COURT.—The objection is sustained.

Mr. HART.—Exception.

Q. Have you made a search for that document since you saw it here?

A. I searched the books; that is the only place I could look for it. I have searched among the papers of the Monetary Trust Company; I have not been able to find it; I could not repeat its contents, but I know what it contained. That document was in the books and it was accessible to every one who looked at it.

The COURT.—Q. Now, was it in the book, pasted or pinned, or how?

A. It was lying loose in these minutes there; it might have been pasted and torn loose.

(Testimony of H. W. Wernse.)

Q. You can tell whether it had been pasted there or not?

A. I have not examined it for that purpose.

Q. Don't you remember whether it was pasted in there, or not, or fastened in any way?

A. When this suit was started, I opened the book and found it loose, and I did not change it at all.

Q. It was not fast, then?

A. It was not fast, no.

Mr. HART.—Q. Are you able to state its contents? A. Yes.

Q. In substance? A. Yes.

Q. Well, state what it was.

Mr. WHITMORE.—I object on the ground it is immaterial, irrelevant and incompetent.

The COURT.—You have not laid any foundation for it, General, to state its contents.

Mr. HART.—I think I have gone as far as I can.

The WITNESS.—I was secretary of the company and had the option. [206—128]

Q. Of the Monetary Trust Company—I am speaking of the Monetary Trust Company.

A. In the possession of the secretary?

Q. Yes.

A. It was in the book; the book was in the office. The only time that the secretary had the book was when he came down to the meetings.

Q. Who had charge of the book—that is, who kept the book?

A. The secretary kept the book, Albert Betz. He wrote the minutes up. When the book was not in

(Testimony of H. W. Wernse.)

his possession, it was left in the safe in my office. I have looked for this option and cannot find it.

**[Testimony of Albert Betz, for Defendants
(Recalled).]**

ALBERT BETZ, being recalled for the defendant, testified as follows:

I have a very incomplete recollection about this option being in that book, and that is all. I had not the book except when I came down to the meetings.

Mr. HART.—Q. In other words, the possession of the books was retained by Mr. Wernse in the office?

A. They were always there. The minutes were written up by me. I have not got this option and never did have it.

**[Testimony of H. W. Wernse, for Defendants
(Recalled).]**

H. W. WERNSE, being recalled, testified as follows: [207—129]

Mr. HART.—Q. Mr. Wernse, please state to the Court the contents of this option referred to in these minutes?

A. It was an option giving Mr. Cutting the right to purchase—

Q. (Intg.) State the language as near as you can.

A. Well, that is a very hard thing for me to do. I did not dictate the option. I read it over a number of times. It gave Mr. Cutting the right to pur-

(Testimony of H. W. Wernse.)

chase 1175 shares of the Point Richmond Canal & Land Company's stock, which was the stock of the Monetary Trust Company, for \$1.00 per share. It was signed "Monetary Trust Company, by Wm. H. H. Hart" and "H. W. Wernse, members of executive committee." That is the document that is referred to in the minutes.

Mr. HART.—Q. State whether or not the document that you have just referred to was the one mentioned here in the minutes of November 10, 1906?

A. Yes, it was the only option we have ever given on the stock.

On cross-examination the witness testified as follows:

I think the date of the option was September, 1906. The time within which he could execute the option, as provided in the option, was, to the best of my knowledge, about six months. I believe there was a space of time specified. I think the option was executed the day that one of these minutes appears [208—130] dated, September 3d.

The COURT.—Q. Was this option executed at a meeting of the directors?

A. No, at a meeting of the executive committee.

Q. Where was there an executive committee?

A. A meeting was held.

Q. Who created the executive committee?

A. Mr. Cutting and Mr. Hart.

Q. Who created the executive committee, I say?

(Testimony of H. W. Wernse.)

A. The by-laws.

Q. Where is there anything in the minutes as to who appointed the executive committee?

A. If I had the minute-book, I could tell you.

(Mr. Hart hands minute-book to the witness.)

The WITNESS.—“Here is the motion. “On motion duly made and seconded, H. W. Wernse was appointed third member of the executive committee until the further order of the board.” I am looking back to see who composed the executive committee, who were made members of the executive committee. I do not find anything before that. I just find this one motion.

Mr. HART.—Q. Mr. Wernse, where is the by-law book of the Monetary Trust Company?

Mr. CLAYBURG.—Here it is.

Mr. HART.—Q. Do you find anything there in reference to the executive committee?

A. Only the motion I have just read to his Honor. There is nothing in the first minutes of the meeting of the organization that appoints an executive committee until that motion appointing Mr. Wernse the third member.

Q. I call your attention to Article Xa—this has been offered in evidence, your Honor. Section 1 reads: “For the purpose of facilitating the conducting of the business of this company, [209—131] there shall be appointed by the board of directors an executive committee of three persons. 2d. The president and chief counsel of the company shall constitute two of said committee, and the board of

(Testimony of H. W. Wernse.)

directors shall select the third member of said committee from their number, or may select such other person as may be deemed for the best interest of the company. 3d. Said committee shall have full charge of and shall conduct and carry on the business of the company, and report its actions to the board of directors at the meeting of the board held next thereafter."

The COURT.—That would show the president and the attorney were the other two members of the executive committee and you were appointed the third one. The president and the attorney were standing members ex-officio of that committee.

Mr. HART.—Yes.

Q. Who was chief counsel of the company at that time, Mr. Wernse, myself?

A. Yes. Mr. Cutting was president of the company, and I was appointed the third member of the committee.

Mr. WHITMORE,—Q. Do you now recall the date on which this option was executed? You have the minute-book?

A. No, I don't know the exact date. It was in September. The executive committee reported to the board of directors what action they had taken. They reported on November 10, 1906.

Q. Just read the report. That is a stockholders' meeting, or directors' meeting?

A. Stockholders' meeting.

Q. I did not ask you about a stockholders' meet-

(Testimony of H. W. Wernse.)

ing. Did they ever report to the board that they had given an option?

The COURT.—This was not an executive committee of the stockholders, but an executive committee of the board of directors. [210—132]

On redirect examination, the witness testified as follows:

Mr. HART.—Q. As a matter of fact, in your actions in the board of directors at all times, were you present at the meetings where it was designated in the minutes?

A. Yes. I was elected a director of the Monetary Trust Company. I was elected a member of the board by the stockholders. Mr. Cutting did not at any time request me to vote in any particular manner. I acted independent, on my own volition and mind, at all the meetings.

Q. How did it come about that the 1175 shares were sold for \$1 per share?

A. The stock of Mr. Reichert and Mr. Lewis was bought at that price.

Mr. HART.—Q. What had that stock cost the Monetary Trust Company, if anything?

Mr. WHITMORE.—I object to that question as immaterial. It makes no difference what it cost.

The COURT.—The objection is sustained.

Mr. HART.—Q. Do you know why the executive committee made the option to Mr. Cutting for \$1175, on what they based their judgment? If so, state.

A. They discussed the matter of paying an assess-

(Testimony of H. W. Wernse.)

ment to carry on the work or selling the stock.

The COURT.—Q. Mr. Wernse, why was a transaction of this kind carried through, assuming just for the moment that it could be legally carried through, where one of the three present was one of the interested parties, without the presence of the other directors of this corporation, Mr. Mayo and Mr. Betz?

A. We deemed it for the best interests of the Trust Company to dispose of it. They were sent notices to appear and they did not appear. I sent notices out as I was directed at this time. The secretary was not here. He was in Napa, living there. The directors were notified and they were consulted about it when they came in. They did not come to the meeting. They were in [211—133—134] at different times.

Recross-examination.

Mr. WHITMORE.—Q. You say that they talked of on assessment on the stock of this company?

A. Yes.

It is not true that at the time I knew that Mr. Cutting had 753 shares of stock that presumably had been purchased at \$10 a share and had only paid \$1,825 on it.

Q. Had he paid any more? A. Yes.

The WITNESS.—I think if the books of the company were taken and gone through and posted up, you will find he has paid for his stock.

Q. You footed it up the other day and said it was

(Testimony of H. W. Wernse.)

\$1,825, didn't you?

A. I didn't say that was what he paid.

Mr. WHITMORE.—That being the case, Mr. Cutting had not paid up the subscription on this stock at the time that you gave this option, and that you were talking of assessing the company or getting money into the company?

A. I am not so sure that all those items were read. If [212—135] the journal and the cash-book were both gone through, you could arrive at the exact amount that was paid in, because those are the two books in which the original entries were made.

Q. What were you talking of assessing this company for when immediately upon getting this \$1,175 you loaned it back to Mr. Cutting and did not use it?

A. We did not loan it to him until six months thereafter.

Q. Didn't you loan it to him the very day that this transaction was consummated or pretended to be consummated?

A. I would not say I did, because we have a note for it.

Q. When you took his note for it, where did you get the money?

The COURT.—Well, I think that has been gone into sufficiently. I should find upon the evidence as it is thus far developed, that that check never was cashed at all. It was turned back to Mr. Cutting and his note taken for it.

Mr. WHITMORE.—Very well, that is all.

(Testimony of H. W. Wernse.)

On redirect examination the witness testified as follows:

I have my office adjoining Mr. Cutting at the present time. I have had my office there since 1908, that is, in the Monadnock Building; we moved from the 9th floor down to the 7th floor, about three years ago. None of the furniture in any of those offices in the Monadnock Building is the furniture of the Monetary Trust Company.

The Monetary Trust Company has not been paying salaries since the removal to the Monadnock Building. None of the furniture or expenses have been paid for by the Monetary Trust Company.
[213—136]

**[Testimony of Albert Betz, for Defendants
(Recalled).]**

ALBERT BETZ, recalled for the defendants, testified as follows:

I was a director in this company for a good many years. In acting as a director, I acted upon my own judgment and views. I voted according to my best judgment as I understood the situation. I don't recall having any conversation with Mr. Mayo as to this sale or stock transaction. I could not state now how soon after this 1175 shares of stock were sold I ascertained the fact. I have heard the matter of the sale generally discussed. I heard it talked of after the sale. I could not positively state whether or not the matter was discussed in the presence of Mr. Mayo; I don't remember that.

(Testimony of Albert Betz.)

On cross-examination the witness testified as follows:

I never had a share of stock in this company. I have a certificate for 55 shares. I paid no money into the company for those 55 shares of stock. I got it by working for the company. I suppose that was my compensation for work for the company. I acted as secretary; that was practically all the work I did. The stock was given to me at the time of the organization of the company.

The COURT.—Not 55 shares at the time of the organization. How did you get the 55 shares afterwards?

A. I could not tell positively how I did get them.

The COURT.—Q. Who does it belong to?

A. It belongs to me.

Mr. WHITMORE.—But you never paid in any money. A. No.

Q. Didn't you go into this company at the request of General [214—137] Hart, to form one of the board of directors, to accommodate him?

A. No, I did not.

Mr. WHITMORE.—Then, you were in there as an accommodation to the other people, were you not?

A. Possibly they so considered it. I thought it was a good thing for me also.

The WITNESS.—(Continuing.) I took no part in the conduct of the business, except to come down as secretary sometimes. That is about the only time I was in the office. I lived here at the time that this company was organized, and for several years. I

(Testimony of Albert Betz.)

attended the meetings and acted as secretary; that was all. When they wanted to put anything through, after it was all discussed, I helped to put it through. I had an interest in it to the extent of 55 shares. I did not have anything to do with the conduct of the business in that way, but I did in this way, that I supposed that every action taken for the interest of the company was for my best interests also. Mr. Cutting never asked me to do a certain thing.

Q. You did not interfere; whenever General Hart and Mr. Cutting suggested a thing, it went, didn't it?

A. No.

Q. Did you ever vote against any proposition that was presented to the board?

A. I could not state that unless I looked over all the meetings; all the minutes.

The COURT.—You have no recollection of having voted that way? A. No. [215—138]

On redirect examination, the witness testified as follows:

Mr. HART.—Q. Did you receive any salary or compensation from the company other than stock for your services?

A. No, except, I will qualify that, some meetings ago there was allowed \$5 for attending a meeting.

[Testimony of W. J. Morgan, for Defendants.]

W. J. MORGAN, called for the defendants and duly sworn, testified as follows:

I am the gentleman who is mentioned in the minutes as W. J. Morgan. I know Mr. Cutting, Mr. Wernse, Mr. Betz and yourself (General Hart). I

(Testimony of W. J. Morgan.)

was also a director of this Monetary Trust Company at one time. My business is that of real estate. I have been in that business about fifteen years. I know this property known as the Canal Division in Richmond. I first saw the property along in 1904, I believe. I presume I have been there half a dozen times. I know something about the values of property at Richmond in a general way—not very familiar with it. I am not very familiar with the property; I never operated there. I am familiar in a way with the acreage prices in Richmond. I at one time thought of buying some property over there and went over and looked at it several times and had prices quoted to me and fixed in different localities. I have been dealing in real estate down the peninsula. I went over the land once I think in 1906, and at that time, of course, it was marsh, and we had a good deal of difficulty in getting over it, but I formed an opinion of the property, that is, if dredging work was done, etc., the property could be put into shape, it could be made a splendid division, net a great deal [216—139] of profit.

On one occasion I made inquiries of prices of land at Richmond; I went over there looking for a subdivision and was shown some property; the prices were quoted to me. In that way I got a general idea of the prices prevailing in the vicinity. I think that was about two years ago, as near as I can remember. As early as 1906 I had not made sufficient examination to determine values of property.

With reference to this transaction of Mr. Cutting's

(Testimony of W. J. Morgan.)

with the Monetary Trust Company—in reference to these 1175 shares—I remember that the matter was discussed with me and with other members of the company, in regard to selling the stock, and, as near as I can remember, we agreed to sell the stock at \$1 a share.

Q. When was this arrangement made that you have just mentioned?

A. Why, it was talked over generally among the parties interested, as I understood, all of the directors, before the meeting, and I think \$1 a share, as I remember, was the price that Mr. Cutting offered, and that was the price that was agreed upon.

Q. Was Mr. Mayo present at any of the conversations?

A. I cannot recall whether Mr. Mayo was present when this talk [217—140] was had with reference to the stock or not. I have no recollection.

The WITNESS.—(Continuing.) I could not see why the price was fixed at \$1 a share, except that Mr. Cutting offered \$1 a share. At that time I did not consider it a reasonable price for the stock, in view of the fact that at that price per share I would not near get out the money that I had put into it, but under the circumstances I agreed to it. I mean by the circumstances, with the unsettled condition of the affairs of the company, etc., I felt that while I would not be getting out whole on the proposition, that probably it was the best that could be done, and I was busy with other matters and my interests were not very large, so I just agreed to it and let it go. I

(Testimony of W. J. Morgan.)

paid half of the rent, as I remember, of the office of the Monetary Trust Company; that was paid directly to the corporation. The corporation, I believe, was paying \$150 a month—I think they started to pay \$135, and I believe a little later that the rent was to be \$150—I paid \$75; that is my recollection of it.

The COURT.—That is \$75 toward the rent and then your half of any other expenses, I suppose?

A. Well, no, I did not—

Q. (Intg.) I notice that several months you paid as high as ninety odd dollars; that must have been for other expenses, was it not, besides rent?

A. No, I was paying half the rent. I was carrying on a separate business—while I was an officer of the company I had other business of my own, and that is the reason I paid half of the rent. I don't know what these other items could have been making it \$90; it might have been for something that I had done in the office, maybe some stenographic work, or something like that.

Q. Perhaps you paid your share of the telephone service? [218—141]

A. I guess that was probably it.

There was talk of an assessment. I remember Mr. Cutting stating that something had to be done over at Richmond, with the property, and that if the Monetary Trust Company could not put up any money with which to carry on the business, they had better sell the stock to him and he would put more money into the thing and *and* go on with it. The assessment spoken of, I presume, was that Mr. Cutting stated it

(Testimony of W. J. Morgan.)

would be necessary for the Monetary Trust Company to pay an assessment or raise money to carry on the business over there, if they went on with the business. At that time my recollection is the Monetary Trust Company had 1175 shares of stock in the Point Richmond Canal & Land Company, or a little short of a quarter of the stock. I decided, so far as my position was concerned as a director, that the most feasible thing for the Monetary Trust Company to do in regard to that matter was to sell the stock. I acted on my judgment in that regard.

The COURT.—Was he one of the directors that was present?

The WITNESS.—Yes.

Mr. HART.—Q. Then, as a matter of fact, in making that, in passing that resolution to accept the proposition to sell to Mr. Cutting for \$1,175, you acted on your own judgment? A. I did.

Q. And not on his at all. The minutes show that Mr. Cutting was present, and Mr. Wernse. Is that correct—at that meeting?

The COURT.—Have you any independent recollection about it?

A. Yes, I remember Mr. Cutting and Mr. Wernse being present, and that the matter was taken up and disposed of at that meeting.

Q. Do you know whether or not Mr. Mayo had any knowledge of this transaction at all—what I mean is, have you had any conversation with Mr. Mayo at any time since that meeting as to the [219—142] question of this transaction?

(Testimony of W. J. Morgan.)

A. No, I never had any conversation with Mr. Mayo until this suit, I believe, was commenced. I have no recollection of having any talk with Mr. Mayo until the beginning of this action.

On cross-examination, the witness testified as follows:

I had 65 shares of stock in this company. I sent a check to General Hart for it. At the time I bought the stock I was living in Sacramento. I never knew where it came from, whether it was company stock or whether it was the General's stock; I simply sent the check and received the stock.

The COURT.—Q. How much was the check?

A. I sent a check, if my recollection is right, for \$160.

I was acting in the capacity of vice-president, and occasionally, when the *present* was absent, of course, I acted in his stead. I was present, I believe, at most of the meetings that took place. I had my office in the same room, and consequently was there. Mr. Wernse was the active officer of the company. Propositions were brought in—as I say, Mr. Wernse was the active officer in the company, and looked out for the business, etc., and whenever anything developed that looked worth while talking about, it was brought in and talked over. General Hart and Mr. Wernse both were looking after the interests of the company, outside, and in the way of developing business propositions for it. I did not take an active hand in that part of the business; I had real estate.

Q. When they had looked it over and thought it

(Testimony of W. J. Morgan.)

was good, and so stated, you felt so, too, didn't you?

A. No, I didn't think so; unless it appealed to me. I never allow anybody else to do my thinking in business questions. [220—143] I cannot say positively that I can cite any particular instance where I voted against anything that was brought up, but my belief is I did on a number of occasions. It has been so long ago, about ten years ago, since this transaction happened, that my memory does not serve me.

The COURT.—Do you still retain your interest?

A. I do.

**[Testimony of H. C. Cutting, for Defendants
(Recalled).]**

H. C. CUTTING, being recalled, testified as follows:

Mr. HART.—Q. Mr. Cutting, what conversation was had between yourself and the directors of the Monetary Trust Company in reference to the raising of money for the purpose of carrying on the business of the Point Richmond Canal & Land Company before the option to purchase this stock was given to you?

Mr. WHITMORE.—I think the question is too indefinite; it does not state what directors, or whether it was all of them or not, or at any time or place.

The COURT.—Yes, I think so. The objection will be sustained.

Mr. HART.—Exception.

The WITNESS.—I had a conversation with Mr. Mayo. Mr. Mayo was present at the meeting on September 3d, before the option to purchase this

(Testimony of H. C. Cutting.)

stock was given me, when the whole matter was discussed. I told Mr. Mayo at that meeting and the other directors, that I had an option on Mr. Reichart's stock at \$1 a share; that I expected to get Dr. Lewis' stock unless he would come in and join me, and that that would give me three-quarters of the stock of the company, and that as I had \$10,000 invested in the company, I wanted them to either take my stock and bonds— [221—144]

Mr. HART.—Q. Who was present at that meeting? Was Mr. Mayo present?

A. Mr. Mayo was present. He said he would not put up any money to go on with the Richmond proposition,—to carry on the work over at Richmond. I don't think that this matter is straight. I would like to make a statement of this whole proposition. I can make it in a few minutes and be cross-examined on it, and then I think everyone would understand it.

I met Mr. Mayo after December 20, 1906, after I gave that check for the stock, and we talked over my buying the stock.

Q. How soon after that did you talk over the fact of buying the stock with him?

A. Well, that is a hard thing to remember—1906—I could not remember the date, but I know Mayo often asked me how I was getting along over there, and everything; he knew that I had purchased the stock, and asked me how I was getting along.

He was up at 925 Golden Gate Avenue quite often. I think he called the next day after this meeting of the board, but I would not swear it was the next day.

(Testimony of H. C. Cutting.)

I knew he was there within a few days of the time that it was done, and the whole matter was talked over, and I explained to him that I had my own money in there and that I had a majority of the stock of the Point Richmond Canal & Land Company, and I was going to go ahead with the work, and I would put an assessment on the stock of the Point Richmond Canal & Land Company, and if the Monetary did not pay its assessment, it would get nothing for its stock, but that the Monetary had put up about \$500—and that was your advice, General, that I buy the Monetary at \$1.00 a share the same as I had bought everybody else's. It was done on your advice, that I gave them \$1 a share. I could have just as well [222—145—146] assessed the stock of the Point Richmond Canal & Land Company and then if they did not come through and pay their assessment and put up one-quarter of what I had to put up, they would have got nothing for it.

I am just talking of Mr. Mayo.

I had that conversation, in substance, with Mr. Mayo on the 3d of September, when all the directors were there, and then it was talked over again afterwards; it was talked over a whole lot of times, in 1906. At that time I was president of the Monetary Trust Company.

At that time, before his check was paid in, the Monetary Trust Company had no money of its own to pay any assessment on this stock; it never did have any money except what Mayo and I paid in.

Q. When did you first learn that the complainants

(Testimony of H. C. Cutting.)

in this case had any interest in this company?

A. When Mr. Mayo gave his testimony here.

Mr. WHITMORE.—I object to that as immaterial and irrelevant, what he heard about it.

The COURT.—Yes, that is wholly immaterial, when he first heard about it.

The WITNESS.—“I did not know at any time that these complainants had any interest other than the five shares until it was testified to by Mr. Mayo and up to the time of the filing of this bill.”

Mr. HART.—Q. Mr. Cutting, have you any further statement you desire to make in reference to the transaction of the sale of this stock? If so, state it.

A. I don't know of anything that I can think of. I would like to state, in answer to the charges, that I did not compel any of the directors to vote Aye or No on the proposition; it was left up to them—it was put up to them as a square [223—147—148] business proposition.

I absolutely did not undertake to control the directors in their decision. Mr. Wernse was not in my employ until the spring of 1907; he was the employee of the Monetary Trust Company; I had nothing to do with the organization of the Monetary Trust Company. They came after me and got me to go there. I charged them nothing for my services; I put up money to pay their expenses. I tried to sell these bonds. I tried to do this thing for them, but nobody else would do anything. We tried to get—

The General and I have had no chance to talk this matter over. I came down from Seattle here

(Testimony of H. C. Cutting.)

day before yesterday, and we had no chance to prepare our case.

Mr. HART.—Q. During the time that the offices of the Trust Company were at 79 New Montgomery Street, was Mr. Wernse at any of that time under your employ?

A. At no time until the spring of 1907. I had no business down here that justified my employing anybody.

The COURT.—Q. After the spring of 1907, his services have never been charged to the company?

A. No.

Q. It was only prior to that time?

A. Prior to that time, and no expense has been charged to the Monetary Trust Company. And the reason why I borrowed this money from the Monetary Trust Company was so as to avoid the expense of hiring someone to look after it. I owe the money to the Monetary Trust Company, and I am willing to pay it any time it is called for, but I might as well use it and pay 8 per cent. [224—149—150]

(An adjournment was here taken until Tuesday, November 24, 1914, at ten A. M.)

Tuesday, November 24, 1914.

The witness H. C. CUTTING, being recalled, testified as follows:

Mr. HART.—Q. Do you know whether any salaries were paid after the fire by the Monetary Trust Company to anyone?

A. I think Mr. Wernse drew a salary for two or three months after the fire.

(Testimony of H. C. Cutting.)

I began active work with the Point Richmond Canal & Land Company in the spring of 1907, about April, I think.

The certificates of the shares of stock of the Monetary Trust Company in the Point Richmond Canal & Land Company was delivered to me at the time I gave my check for it—the 20th of December, 1906.
[225—150]

Negotiations had been carried on in reference to the purchase of that stock previous to that time. I had asked different members of the Monetary what they were going to do along in August and September.

The members of the executive committee at the time of the option were [226—151] the chief counsel, yourself, Wm. H. H. Hart, the president, myself, and Mr. Wernse. That option was in writing. As president I was a member of that committee at that time. The option was signed by Wernse and yourself.

I remember the suit of Hackett v. Point Richmond Canal & Land Company; that was in 1904 or 1905.

The purpose of that was, the Hackett dredge went over there and attempted to do some dredging and they failed in doing what they attempted to do, and they afterwards sued the Point Richmond Canal & Land Company for something like \$400—something over \$400. The suit was for a larger sum, but they obtained a judgment for something over \$400. I guess that was it. I don't think they ever obtained a judgment but it was settled for that.

The Monetary Trust Company had no money to do

(Testimony of H. C. Cutting.)

anything with, and the stockholders of the Monetary Trust Company were not willing to put up any to pay off that claim. They were not willing to be assessed.

On cross-examination the witness testified as follows:

I had advanced to the Point Richmond Canal & Land Company \$10,125 prior to the 20th of December, 1906. For that \$10,125, I received 27 of the bonds of the Point Richmond Canal & Land Company and 2350 shares of stock from Mr. Reichart.

* * *

The COURT.—What was the consideration paid for it?

A. The consideration was that if I should buy the 27 bonds for \$10,125, that the stock should be given to me, the way I understand it.

Q. By Mr. Reichart.

A. Yes; Mr. Reichart owned all the stock except—the agreement really was at the time that I would do this, then the Monetary should get the 1175 shares; [227—152] otherwise, the Monetary would not have gotten anything.

Mr. WHITMORE.—Q. Then you did not pay any-money consideration for the stock of the Point Richmond Canal & Land Company?

A. I certainly would never have bought the bonds if I had not got the stock; nobody would.

Q. You paid no money for it, more than to buy these bonds?

A. You can take that as you please; I paid the

(Testimony of H. C. Cutting.)

\$10,125 for the stock or the bonds, but I certainly would not have bought the bonds unless I got the stock.

Mr. WHITMORE.—I ask that that last statement be stricken out.

The COURT.—Let it go out.

Mr. WHITMORE.—You bought these bonds at 75 cents on the dollar? A. Yes.

I did not advance any money to that corporation other than the money I paid for the purchase of those bonds at 75 cents on the dollar, up to that time. I could not say how many of the bonds have been retired as a lien against that property. I don't remember offhand. I should think about 40 or forty-five thousand dollars' worth; that would be probably 80 or 90 bonds. I should think about in the neighborhood of one-third of this land owned by the Point Richmond Canal & Land Company has been contracted for sale.

I could not answer as to how much money has been received from the sale of that land; approximately, I should think perhaps \$75,000 or \$80,000.

Q. Hasn't there been \$750,000?

A. I don't know who received it; if there has been that much sold. There has not been that much contracted for, sold under contract, that they are paying on now. I think the contracts amount to about \$500,000. [228—153]

I purchased the balance of the bonds of the Point Richmond Canal & Land Company on an agreement with Mr. Mintzer, the holder of the other bonds.

(Testimony of H. C. Cutting.)

About \$30,000 worth of the bonds held by Mr. Mintzer have been released and surrendered.

Q. That reduced the purchase price of the property to that extent, did it?

A. They have been paid; the bonds have been paid.

Q. Yes, but didn't you have a contract with Mr. Mintzer whereby they took a less price and released some of these bonds?

A. No, I didn't release any of the bonds.

After the fire of April, 1906, I think the Monetary Trust Company closed up that Pacific Underwriting & Trust proposition; that is all the business they did that I know of; we could not do business without money.

I borrowed some money from that company; I have not paid that, but I will any time.

Q. You own 753 shares of stock of this company, and you have only paid \$1,826.25?

A. I paid \$4,500 in cash for it, and the books show it. The books that are in this court show it.

Q. Will you get that book and show it.

A. Yes.

Q. Let us see it, please. * * * Just turn to the books. You say the books show it.

A. I did not keep the books. The man that kept the books made a statement off of these books in that office the other day and the statement is here.

Mr. WHITMORE.—I ask that that be stricken out.

The COURT.—Let it go out.

(Testimony of H. C. Cutting.)

A. I can get the books and look through them.
[229—154]

The WITNESS.—After I obtained these 1175 shares of stock it was about six months or about four months before I commenced to operate actively with the Point Richmond Canal & Land Co.

Q. And when acting actively, you had a sale of the property of the company, didn't you?

A. No, not until a long time afterwards; I put in over \$50,000 before there were any sales made; and then they did not amount to anything.

I did not have a sale in March or April, 1907.

I had all the stock before I put up the \$50,000. If I had not had it, I would not have put it up. I got all the bonds that were left. I had purchased 27 of the 64 bonds before that.

Q. When you say you put in \$50,000, you got bonds for all the money you put in, didn't you?

A. No; after the bonds were exhausted, I still put up quite a bit of money. [230—155]

Mr. HART.—If your Honor please, I dislike to testify in a case in which I am an attorney, but my client insists that I should make a statement in reference to that particular option matter, and I of course hate to do it, because I understand under the rules of the court that counsel is not permitted to sum up the case. Of course, in summing up the case, I will not refer to my own testimony, because that would be in the bosom of the Court. I desire to submit that matter to your Honor's consideration before I make my statement.

(Testimony of H. C. Cutting.)

The COURT.—Counsel is well aware of the rule; you can take your course accordingly.

Mr. HART.—Counsel on the other side will not object, because it simply goes as to a matter of record.

The COURT.—They have no right to object.

Mr. HART.—I presume not.

The COURT.—It rests with you. If you wish to take the stand, it is your privilege.

Mr. HART.—But if that would debar me from making a summing up of the case, I prefer not to do it.

The COURT.—Very well; you will have to advise yourself, General. The rule is very strict that if counsel testifies upon the merits, then he is precluded from summing up the case.

**[Testimony of H. W. Wernse, for Defendant
(Recalled).]**

H. W. WERNSE, being recalled for the defendant, testified as follows:

Mr. HART.—I understand, your Honor, that all the minutes and the by-laws are in evidence.

The COURT.—I think so.

Mr. HART.—Q. Mr. WERNSE, have you in your possession a certified copy of the articles of incorporation of the Monetary Trust Company?

A. Yes, sir.

These are in evidence as Deft's. Ex. "D."

[231—156]

Testimony closed.

The following pages from 159 to 291 inclusive are photographic copies of records, papers and documents admitted in evidence in behalf of the respective parties to the suit.

Dated, San Francisco, California, December 4, 1915.

JACOB M. BLAKE,

Solicitor for the Defendant, Henry C. Cutting.

[Stipulation as to Statement of Evidence.]

It is hereby stipulated by and between the parties hereto that the within, and foregoing statement of the evidence has been engrossed as previously settled this 31st day of December, 1915.

[Order Certifying and Allowing Statement of Evidence.]

The above and foregoing statement being stipulated, as correct is hereby certified and allowed this 3d day of January, 1916.

WM. C. VAN FLEET,

District Judge.

JOHN B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for Complainant.

JACOB M. BLAKE,

Solicitor for Defendant, Henry C. Cutting.

W. H. H. HART,

Solicitor for Monetary Trust Co. [232—157]

[Here follows photographic copies of Exhibits, being pages 234 to 405, inclusive, of Original Certified Transcript of the Record.]

Petition for Appeal.

The above-named defendant, Henry C. Cutting, conceiving himself aggrieved by the decree entered in the above-entitled cause on the 6th day of October, 1915, hereby appeals from said decree, and from each and every severable part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that the appeal may be allowed and that a transcript of the records, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner prays that said decree, and each and every severable part thereof, may be reviewed and reversed.

Dated November 5th, 1915.

JACOB M. BLAKE,
Solicitor and Counsel for the Defendant, Henry C.
Cutting.

[Endorsed:] Filed November 5, 1915. [406]

Assignments of Error.

The defendant above named, Henry C. Cutting, asserts, that in rendering the decree in the above-entitled cause on the 6th day of October, 1915, the said District Court erred in the following particulars, to wit:

I.

In overruling the motion of the defendant, Henry C. Cutting, to dismiss complainant's third amended bill of complaint.

II.

In finding that the complainants were, or either of them was, a shareholder in their or his own right in the defendant, the Monetary Trust Company, at the time of the contract of sale of 1,175 shares of the capital stock of the Point Richmond Canal & Land Company by the Trust Company to the said Cutting on or about the 20th day of December, 1906.

III.

In finding that this suit was not a colusive one to confer on a court of the United States, jurisdiction of a case of which it would not otherwise have cognizance.

IV.

In finding that the complainants, or either of them, had made any efforts in good faith, or at all, to secure the action [407] they desire on the part of the managing directors of the Monetary Trust Company, and had failed therein.

V.

In finding that the complainants, or either of them, had made any efforts in good faith or at all, to secure the action they desire on the part of the other shareholders of the Monetary Trust Company, and had failed therein.

VI.

In not finding that the complainants, nor either of them, had no good or sufficient reasons for not mak-

ing any efforts to secure the action they desire on the part of the managing directors of the Monetary Trust Company or of the other shareholders.

VII.

In finding that the complainant, Henry J. Woodward, was ever the equitable owner or holder, for a valuable consideration or otherwise, of six hundred shares, or thereabouts, or of any, of the capital stock of the defendant, the Monetary Trust Company.

VIII.

In finding that the complainants, Henry J. Woodward and Francis A. Woodward, or either of them, were ever the legal and beneficial owners of any substantial amount of the capital stock of the Monetary Trust Company, or of any amount thereof more than the amount necessary to qualify them as directors of said trust company, and that they ever were the beneficial owners of such last-mentioned amount of stock.

IX.

In finding that the defendant, Henry C. Cutting, promised and agreed with the defendant, the Monetary Trust Company, or any of its officers at the time of or before any stock of said trust company was issued to him, or at all, that he would pay [408] into the treasury of said trust company ten dollars (\$10.00) per share for five hundred (500) shares of said capital stock, and also that he would finance said company and place it in such a condition that it could safely proceed with its business in a proper method and manner.

X.

In declaring the contract entered into on or about December 20, 1906, between the defendant, the Monetary Trust Company, and the defendant, Henry C. Cutting, for the transfer to the latter of said 1,175 shares of the capital stock of the Point Richmond Canal & Land Company, was and is fraudulent and void, and vested no title to said shares of stock in the said Cutting, but that said shares of stock still remain the property of the Monetary Trust Company, and that the latter is entitled to have said shares restored to its name upon the books of said Point Richmond Canal & Land Company.

XI.

In declaring that the defendant, Henry C. Cutting, has no title or right of property in or to the income, profits, dividends, or benefits of any character received by, or derived to his benefit from or on account of said 1,175 shares of the capital stock of said Point Richmond Canal & Land Company since the transfer thereof as aforesaid, or while the same has stood in his name; and that the complainants, on behalf of the defendant, the Monetary Trust Company, are entitled to have an accounting from the defendant, Henry C. Cutting, of all such profits, dividends, or benefits, if any.

XII.

In finding that the defendant, Henry C. Cutting, has conducted his private business affairs with and through the instrumentality of the employees and officers of the defendant, the [409] Monetary Trust Company, and has fraudulently and wrong-

fully caused his own private stenographer to be paid out of the assets and property of said trust company.

XIII.

In finding that the defendant, Henry C. Cutting, has fraudulently caused the defendant, the Monetary Trust Company, to purchase a large amount of choice furniture, and make elaborate and expensive changes in the interior of the offices of said trust company for the sole, or any, use or benefit of the said Cutting.

XIV.

In finding that the defendant, Henry C. Cutting, has unlawfully, fraudulently, or at all, misapplied or misappropriated any money, funds, securities, profits or properties of the defendant, the Monetary Trust Company.

XV.

In finding that the defendant, the Monetary Trust Company, was ever the legal or equitable owner or holder of any other 1,175 shares, or of any share or number of shares of the capital stock of the Point Richmond Canal & Land Company, other than the 1,175 shares thereof first hereinbefore mentioned, or that said trust company was ever the legal or equitable owner or holder of any bonds, stocks, securities or other property, real, personal, or mixed, issued by or formerly the property of the Point Richmond Canal & Land Company, other than 1,175 shares of stock last aforesaid.

XVI.

In finding that the defendant, Henry C. Cutting, ever proposed to the defendant, the Monetary Trust Company, that he would finance, and furnish all the

funds necessary to develop and sell the lands of the Point Richmond Canal & Land Company; or that he would buy Ten Thousand Dollars' (\$10,000) worth of the bonds [410] of the Point Richmond Canal & Land Company, and that when that amount was spent he would raise whatever further amount of money might be necessary; or that the Monetary Trust Company accepted such a proposition.

XVII.

In finding that the defendant, Henry C. Cutting, has been guilty of any fraud, deceit or misrepresentations as the president, or a director, or a stockholder of the defendant, the Monetary Trust Company, or as an individual, in any transaction had by him, or in which he has participated, for and on behalf of said trust company, or with it in his personal capacity.

XVIII.

In declaring that the plaintiffs, for and on behalf of said Monetary Trust Company, are entitled to an accounting from the defendant, Henry C. Cutting, of all moneys due and owing, if any be found, from said Cutting to said trust company for and on account of any other 1,175 shares of the capital stock of said Point Richmond Canal & Land Company, alleged to have been sold and delivered to the said Cutting by said trust company prior to said 20th day of December, 1906, and likewise to a full accounting of any and all bonds, evidences of indebtedness, and interest or income therefrom, and of all other property of every kind of the Monetary Trust Company, if any, which may be found to have been taken or have

come into the possession of said defendant, Henry C. Cutting, and of any and all sums of money or funds of said Monetary Trust Company paid, laid out or expended by or on behalf of said Cutting on account of office or room rents, or other expenses of any character, or of any sums of money whatsoever belonging to said Monetary Trust Company in anywise appropriated to the use or benefit of said defendant, Henry C. Cutting, and generally to an accounting of all financial or money transactions [411] of any and every character had and occurring between said trust company and the said Cutting during the period covered by the bill of complaint.

XIX.

In denying the petition for a rehearing of the defendant, Henry C. Cutting, for the reason that the same, and the affidavits in support thereof, did not state facts sufficient to justify the relief prayed for upon the ground of newly discovered evidence, material to the defense of the said Cutting, and which could not have been known and produced at the trial by the exercise of reasonable diligence.

XX.

In denying the petition of the defendant, Henry C. Cutting, for a rehearing for the reason that the same, and the affidavits in support thereof, did not state facts sufficient to justify the relief prayed for on the ground of accident and surprise occurring at the trial and prejudicial to the defense of the

said Cutting, against which ordinary prudence and caution could not have guarded.

JACOB M. BLAKE,
Solicitor and Counsel for the Defendant, Henry C.
Cutting.

[Endorsed]: Filed November 5, 1915. [412]

Order Allowing Appeal.

On this 5th day of November, 1915, came Henry C. Cutting, one of the defendants in the above-entitled cause, and filed herein and presented to this court his petition for the allowance of an appeal from the decree made and entered in said cause on the 6th day of October, 1915, and from each and every severable part thereof, together with his assignments of error, and praying that a transcript of the records, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

In consideration whereof this court does hereby allow the said appeal of the said Henry C. Cutting from said decree and each and every severable part thereof, upon the said Cutting giving a bond according to law and the rules of said Circuit Court of Appeals in the sum of five hundred (\$500) dollars, to answer all costs if he shall fail to sustain his said appeal.

Done this 5th day of November, 1915.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed November 5, 1915. [413]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Henry C. Cutting, as principal, and Fidelity and Deposit Company of Maryland, a Corporation created, organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto Henry J. Woodward, Francis A. Woodward, and the Monetary Trust Company, a corporation under the laws of California, in the full and just sum of Five Hundred (\$500) Dollars, to be paid the said Henry J. Woodward, Francis A. Woodward and the Monetary Trust Company, their certain attorneys, executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of November, 1915.

WHEREAS, lately and on the 6th day of October, 1915, at a District Court of the United States for the Northern District of California, Second Division, in a suit depending in said court, between Henry J. Woodward and Francis A. Woodward, complainants, and Henry C. Cutting and the Monetary Trust Company, a corporation, defendants, a decree was rendered against the defendant, Henry C. Cutting, and in favor of the complainants on behalf of the defendant, The Monetary Trust Company; and the said defendant, Henry C. Cutting, having obtained from said court an order allowing an appeal

to the United States Circuit Court of Appeals for [414] the Ninth Circuit to review and reverse the said decree in the aforesaid suit, and a citation directed to said Henry J. Woodward, Francis A. Woodward, and The Monetary Trust Company, a corporation, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Henry C. Cutting shall prosecute his said appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void else to remain in full force and virtue.

HENRY C. CUTTING.

By JACOB M. BLAKE,

His Solicitor and Counsel,

Principal.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND. (Seal)

By EDWIN C. PORTER,

Attorney in Fact.

Attest: PAUL M. NIPPERT, Agent.

Examined and approved this 5th day of November, 1915.

WM. C. VAN FLEET,

District Judge. [415]

(Praeceptum for Transcript on Appeal.)

Please prepare transcript on appeal, incorporating the following papers:

1. Original bill of complaint.
2. Order of dismissal of original bill of complaint.
3. First amended complaint (setting out identical paragraphs in original bill by reference only).
4. Order of dismissal of first amended bill of complaint.
5. Second amended bill of complaint (setting out identical paragraphs in either original or first amended bill by reference only).
6. Orders on two motions to dismiss, filed May 27, 1913.
7. Orders in two motions to dismiss and strike from the files, filed October 1st, 1913.
8. Substitution of attorneys and any order thereon.
9. Stipulation and third amended bill of complaint (in full).
10. Motion to dismiss and strike 3d amended complaint.
11. Amendment 3d amended complaint.
12. Order overruling motion to dismiss 3d amended complaint.
13. Answer to 3d amended complaint.
14. All written opinions of trial judge on file in cause.
15. Petition for rehearing and affidavits in support thereof.

16. Substitution of solicitors for defendant Cutting and notice thereof and order thereon. [416]
17. Interlocutory decree.
18. Appeal papers; assignment of errors; petition; order; citation and bond.
19. Praeceptum for record of appeal, proof of service thereof.
20. Notice of lodgment with clerk, of statement of evidence and proof of service thereof.

N. B. In the preparation of the foregoing transcript, care should be taken to comply with Rule 76, rules of practice for Courts of Equity of the United States.

JACOB M. BLAKE,

Solicitor for Defendant, Henry C. Cutting.

Due service of the within praecipe for transcript on appeal, and receipt of a copy thereof is hereby acknowledged at San Francisco, California, this 4th day of December, 1915.

JNO. B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for Appellees Henry J. Woodward and Francis A. Woodward.

WM. H. H. HART,

Solicitor for Appellee Monetary Trust Company.

[417]

Objections to Proposed Transcript.

Now come the complainants by Clayberg & Whitmore, their solicitors, and object to the insertion in the transcript on appeal of the following papers specified in a certain praecipe for the transcript on appeal,

filed with the clerk of this court, by the solicitor for the appellant, Henry C. Cutting, viz.:

Paper No. 1, Original bill of complaint.

Paper No. 2, Order of dismissal of original bill of complaint.

Paper No. 3, First amended complaint (setting out identical paragraphs in original bill by reference only).

Paper No. 4, Order of dismissal of first amended bill of complaint.

Paper No. 5, Second amended bill of complaint (setting out identical paragraphs in either original or first amended bill by reference only).

Paper No. 6, Orders on two motions to dismiss, filed May 27, 1913.

Paper No. 7, Orders in two motions to dismiss and strike from the files, filed October 1st 1913.

Paper No. 15. Petition for rehearing and affidavits in support thereof.

This objection is made for the reason that none of said papers are necessary to complete said transcript on appeal, and no questions can be presented to said Appellate Court or be [418] based on said papers or any of them, and that their insertion in said transcript would needlessly encumber the same with useless and immaterial matter.

The above objections are made for the purpose of protecting complainants from the costs of printing unnecessary matter in the transcript on appeal, in case the Appellate Court reverses the decree appealed from.

CLAYBERG & WHITMORE,
Solicitors for Complainants.

Due service and receipt of a copy of the within objections to proposed transcript is hereby admitted this 13th day of Dec., 1915.

JACOB M. BLAKE,
Solicitor for Deft. Henry C. Cutting. [419]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing four hundred nineteen (419) pages, numbered from 1 to 419 inclusive, to be a full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$230; that said amount was paid by Henry C. Cutting, defendant; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 7th day of January, A. D., 1916.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
Jan. 7/16., J. A. S.] [420]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Henry J. Woodward, Francis A. Woodward, and The Monetary Trust Company, a Corporation
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Henry C. Cutting is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable William C. Van Fleet, United States District Judge for the District Court of the United States for the Northern District of California, Second Division, this 5th day of November, A. D. 1915.

WM. C. VAN FLEET,
United States District Judge. [421]

Due service of the within citation on appeal is admitted this 5th day of November, 1915.

JNO. B. CLAYBERG,

CLAYBERG & WHITMORE,

Solicitors for the Appellees, Henry J. Woodward and Francis A. Woodward.

WM. H. H. HART,

Solicitor for the Appellee, The Monetary Trust Company, a Corporation.

[Endorsed]: (Original) No. 2—Equity. United States District Court for the Northern District of California, Second Division. Henry C. Cutting, Appellant, vs. Henry J. Woodward, Francis A. Woodward and The Monetary Trust Company, a corporation, Appellees. Citation on Appeal. Filed Nov. 6, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Henry C. Cutting, Appellant, vs. Henry J. Woodward, Francis A. Woodward and The Monetary Trust Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed January 8, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

**Order Enlarging Time [to December 20, 1915] for
filing Record.**

It appearing that the statement of the evidence has not yet been settled and allowed, as required by Rule 76 (b) of the Rules of Practice of Courts of Equity of the United States, and good cause appearing therefor,

IT IS HEREBY ORDERED that the appellant, Henry C. Cutting, may have, and he is hereby granted to and including the 20th day of December, 1915, within which to file the record in the above-entitled action with the clerk of the above-entitled court, at San Francisco, California, and to docket said cause in said court.

Dated December 2d, 1915.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Dec. 2, 1915.

**Order Enlarging Time [to January 6, 1916] for
filing Record.**

It appearing that the statement of the evidence has not yet been settled and allowed, as required by Rule 75 (b) of the Rules of Practice of Courts of Equity of the United States, and good cause appearing therefor,

IT IS HEREBY ORDERED that the appellant, Henry C. Cutting, may have, and he is hereby granted to and including the sixth day of January, 1916,

within which to file the record in the above-entitled action with the clerk of the above-entitled court, at San Francisco, California, and to docket said cause in said court.

Dated December 17th, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 17, 1915.

**Order Extending Time to [January 8, 1916, to] file
Record.**

Good cause appearing therefor, it is hereby ordered that the appellant may have to and including January 8, 1916, within which to file his record on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 6, 1916.

WM C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed January 6, 1916.

[Endorsed]: Three Orders Under Rule 16 Enlarging Time to January 8, 1916, to File Record Thereof and to Docket Case. Refiled January 8, 1916.

**Stipulation [as to Printing Transcript of Record,
etc.].**

It is hereby stipulated that in the printing of the transcript and record on appeal in the above-entitled cause, the following need not be printed:

1. Title of court and cause throughout, except on the Third Amended Bill of Complaint and the Decree.

2. Verification and endorsements except date of the filing of the Third Amended Bill of Complaint, Answer, the Assignments of Error and the Petition and Order for Appeal.

3. Notice of Time of Settling Objections to the transcript on Appeal, at page 233, Statement of the Evidence.

4. The photographic copies of Exhibits, pp. 234 to 405, inclusive of the statement of the evidence.

It is stipulated that all of said documents have been filed and that it is not the intention of the parties to stipulate the aforesaid photographic copies of exhibits out of the record, but that the appellant may apply to the presiding Judge of the United States District Court for the Northern District of California, for such order or rule for the safe-keeping, transporting to the clerk of the above-entitled court, and the return of such original exhibits, now in the custody of the clerk of said District Court, as to him may seem proper. The appellant further stipulates that he will have printed a supplemental transcript showing said photographic copies of said exhibits, or any of them, as may be ordered by the appellees, or any of them, or by the Court.

Nothing herein contained shall be deemed a waiver on the part of the appellees Henry J. Woodward and Francis A. Woodward of their objections

to the inclusion of said exhibits as a part of the record on appeal.

Dated January 11th, 1916.

JACOB M. BLAKE,

Attorney for Appellant.

JNO. B. CLAYBERG,

CLAYBERG & WHITMORE,

Attorneys for Appellees Henry J. Woodward and
Francis A. Woodward.

WM. H. H. HART,

Attorney for the Appellee, the Monetary Trust
Company.

[Endorsed]: Filed Jan. 14, 1916.

